UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	.	Chapter 11
	.	
W.R. GRACE & CO.,	.	Case No. 01-01139(JKF)
et al.,	.	(Jointly Administered)
	.	
Debtors.	.	Nov. 26, 2007 (2:07 p.m.)
	.	(Wilmington)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

THE COURT: Good afternoon, please be seated. This is the matter of W.R. Grace, 01-1139. The participants by phone are: Ari Berman, Brian Mukherjee, Shayne Spencer, Douglas Cameron, Daniel Speights, Jarrad Wright, James Restivo, Walter Slocombe, Alex Mueller, Debra Felder, Richard Wyron, Jay Hughes, Jason Solganick, Jeff Waxman, Igor Volshteyn, Gentry Klein, Lewis Kruger, Janet Baer, Sung Choi, Darrell Scott, Robert Horkovich, Christina Kang, David Siegel, Peter Lockwood, Jacob Cohn, Terence Edwards, Richard Levy, Marti Murray, Roger Frankel, Martin Dies, Peter Shawn, Edward Westbrook, Andrew Craig, Lori Sinanyan, Theodore Freedman, David Bernick, Arlene Krieger, Natalie Ramsey, Andrew Chan, Scott Baena, Paul Norris, Ellen Ahern, Daniel Cohn, Mark Shelnitz, Jonathan Brownstein, John Demmy, Robert Phillips, Carl Pernicone, Andrew Hain, Michael Davis, Robert Guttmann, Tiffany Cobb, Daniel Glosband, Barbara Harding, David Parsons, Sander Esserman, and Van Hooker. I'll take entries in court. Good afternoon.

MR. BERNICK: Good afternoon, Your Honor. David Bernick for Grace.

MS. BAER: Good afternoon, Your Honor, Janet Baer for Grace.

MR. PASQUALE: Good afternoon, Your Honor. Ken Pasquale from Stroock for the Unsecured Creditors Committee.

MR. HOROWITZ: Good afternoon, Your Honor. Greg

Horowitz from Kramer, Levin for the Equity Committee.

MR. O'NEILL: Good afternoon, Your Honor. James O'Neill from Pachulski for the debtor.

MR. FINCH: Good afternoon, Your Honor. Nathan Finch from Caplin & Drysdale for the Grace ACC.

MR. MULLEDY: Good afternoon, Your Honor. Raymond Mulledy for the Future Claimants Representative.

MR. SAKALO: Good afternoon, Your Honor. Jay Sakalo and Matthew Kramer on behalf of the Property Damage Committee.

MR. FRANKEL: Good afternoon, Your Honor. Roger Frankel representing the Future Claims Representative.

MR. INSELBUCH: Elihu Inselbuch from Caplin & Drysdale for the Asbestos Creditors Committee.

MR. HERFORD: Mark Herford, Campbell & Levine, for the ACC.

MR. ANSBRO: John Ansbro, Orrick, Harrington, also for the FCR.

MR. McDANIEL: Garvin McDaniel, Bifferato, Gentilloti, for Royal Indemnity.

MS. HEILMAN: Leslie Heilman, Ballard, Spahr, Andrews & Ingersoll, the State of California Department of General Services.

THE COURT: Anyone else? Ms. Baer?

MS. BAER: Good afternoon, Your Honor.

MS. KEARSE (TELEPHONIC): This is Anne Kearse on the telephone with the Motley Rice claimants.

THE COURT: All right, thank you. Once second. Okay, thanks. Ms. Baer?

MS. BAER: Your Honor, agenda item number 1 is the debtors' fifth omnibus objections to claims. There's one claim left with the Weatherford entities environmental-related claim. We are working on and have an agreement on a settlement. We will probably submit the order before or at the next omnibus hearing. I have an order continuing it until then. Would you like me to hand up the orders now or at the end?

THE COURT: Just do them at the end.

MS. BAER: Okay.

THE COURT: Give me a minute though, please. Okay, thank you.

MS. BAER: Your Honor, agenda item number 2 is the debtors' eighteenth omnibus objections to claims. There are two matters left. One is being resolved today with an order. The second one is in the process of being resolved. We're very close, and we will have an order continuing that matter to the next omnibus in the hopes that by then we'll have an agreement to resolve it completely.

THE COURT: All right.

MS. BAER: Agenda item number 3, Your Honor, is also

a claims objection with respect to Massachusetts. That matter is being continued to the next omnibus hearing, and I have an order that I'll hand up on that one. Agenda item number 4, Your Honor, the debtors' twenty-fourth omnibus objection. That's a new one up for the first time today. There was one response. That response has been resolved. It was a situation where they filed against the wrong debtor. We've agreed that their claim will be considered to be a claim against W.R. Grace & Co. All of the other matters, there were no responses and we will be handing up an order resolving all of those objections.

THE COURT: All right, just a second. Okay, thank you.

MS. BAER: Your Honor, agenda item number 5 is the debtors' application to employ Deloitte Financial Advisory Services to do some due diligence work for the company with respect to a transaction. A certificate of no objections was filed, Your Honor. I have the order if you do not have it and can hand that up at the end also.

THE COURT: I've already told my office to stamp items 2, 5, 6, 7, and 8. I just told them 7 and 8 when we were on the way into court. I hadn't seen those for some reason or other, there was just a glitch. So, 2, 5, 6, 7, and 8 should already be entered by the end of the day.

MS. BAER: Thank you, Your Honor, we will look for

that. Your Honor, with that, I can then skip over items 6, 7, and 8, as you've indicated those orders are being entered. Agenda item number 9, Your Honor, is the PI estimation pretrial, and we're going to skip that for now and just finish the rest of the agenda and then come back to that as that will take more than a couple of minutes.

THE COURT: Okay, one second. So, with respect to item 2, are you handing up a different order or is this the same as the one that I am instructing my staff to enter already?

MS. BAER: We're handing up one additional order, Your Honor, that resolves one of the claims that was on there, and then the second order is the order continuing the matter.

THE COURT: Okay, so there will be three orders altogether, the one that was already filed that I'm telling my staff to enter and two more?

MS. BAER: I'm not sure about the already filed one.

MR. O'NEILL: Your Honor, James O'Neill, for the record. The one already filed is the one claim resolution, and the one which Ms. Baer will hand up is the continuation.

THE COURT: All right, so it will be one more order.

MR. O'NEILL: Correct.

THE COURT: Okay, thank you.

MS. BAER: We'll sort that out before we hand it up,

Your Honor.

THE COURT: All right, let me just make sure I have my notes correct. Okay, I think it is, thank you.

MS. BAER: Your Honor, that takes us to agenda item number 10, which was a motion from California to permit the filing of an expert report. The debtor had no objections to the filing of the report and a certificate of no objections was filed on that matter also. I do have an order if Your Honor does not have that.

THE COURT: I instructed my staff to enter orders on numbers 10 and 11 through 18 as well. So I think that should have been entered or will be entered today.

MS. BAER: That makes it easy, Your Honor. That takes us up to agenda item number 19.

THE COURT: All right, one second, while I get caught up again. Okay.

MS. BAER: Agenda item number 19 is a general status on property damage claims. I believe that Mr. Restivo is on the line.

THE COURT: Mr. Restivo?

MR. RESTIVO (TELEPHONIC): Good afternoon, Your Honor. With respect to item 19, there is nothing new to report on the PD claims. The Court knows what is *sub judice* before the Court, and nothing new has happened since the last omnibus hearing.

THE COURT: Okay, that was easy.

MR. RESTIVO (TELEPHONIC): With respect to item 20, a status conference on ZAI issues, Mr. Westbrook and I once again would like to continue that until the next omnibus hearing.

THE COURT: One second. All right, they're continued, thank you.

MR. RESTIVO (TELEPHONIC): Thank you, Your Honor.

MS. BAER: Your Honor, that takes us to agenda item number 21, which is a status conference that the Court asked us to put on the agenda with respect to Mr. Speight's motion to alter and amend the Court's order disallowing certain claims, and I believe Mr. Bernick is going to address that.

THE COURT: Mr. Bernick?

MR. BERNICK: Your Honor, I'm prepared to go first if that's appropriate, but this is actually Mr. Speights' motion if he wants to address it in the first instance, and I don't know if he's on the phone to do so.

THE COURT: Mr. Speights?

MR. BARRY (TELEPHONIC): Your Honor, this is Bud Barry from Dan Speights' office. Mr. Speights just called me. He should be there shortly. His plane was delayed coming in today.

THE COURT: All right, we'll wait for him for a few minutes, then, Mr. Barry, thank you.

MR. BARRY (TELEPHONIC): Thank you, Your Honor.

MR. BERNICK: I think that the next item on the agenda to take up is item number 9 which deals with the pretrial order in connection with the upcoming estimation trial, and it may be more appropriate actually to have counsel for the ACC at least take the beginning here because I believe that Mr. Finch has drafted up a fairly detailed proposal for the pretrial schedule. There are some outstanding issues, but maybe in order to at least begin with where we agree, it would be appropriate to have him go first.

THE COURT: Mr. Finch?

MR. FINCH: Thank you, Your Honor. Nathan Finch for the ACC. Let me hand the copies of the proposed - this is a draft order, it's not ready for any court signature. It doesn't have numbers and paragraphs and stuff but, it's something I slid to Mr. Bernick, and I think there's agreement in large part. I'd like to pass a copy of it up to Your Honor if that's appropriate.

THE COURT: Sure.

MR. FINCH: And to counsel for the commercial creditors and the Equity Committee, who I don't know if they - I don't believe - I didn't send it them. I don't believe they've seen this.

THE COURT: All right. Thank you.

MR. FINCH: Does Your Honor have the draft in front

of you?

THE COURT: I do.

MR. FINCH: It goes through a series of topics. The first of which is the Daubert motions. Under the Court's current schedule, the Daubert motions will be due November 30th, and the responses would be due - so it's just so the briefing is ended on December the 21st. What we and the debtor have agreed to is that the Daubert motions, the initial Daubert deadline will be due - the briefs will be due January - excuse me, December the 7th with the oppositions to the Daubert motions due on December 21st, and then the replies due January the 7th, and we would ask for some guidance from the Court as to page limitations on that. What we had suggested would be - what we had sort of internally thought about was 75 pages for the - per party for the initial Daubert briefs, and then 75 pages for the responsive Daubert briefs, and then replies limited to no more than 30 pages. That's sort of thinking through it and working out the number of pages.

THE COURT: When you're talking about 75 pages, are you talking about collectively, for all experts or per expert?

MR. FENCH: No, no, collectively for all experts. Basically, the ACC would have a brief of 75 pages. The debtor would have a brief of 75 pages. The Commercial

Creditors could put in a brief of 75 pages. Equity, 75 pages, if they need it. I mean, I'm not suggesting that everybody needs that. The FCR -

THE COURT: And you expect that I'm going to read all these things, including the replies of 30 pages each the week before trial starts.

MR. FINCH: Well, I suspect we will be shorter than that, but that is the idea, Your Honor.

THE COURT: You will not be shorter. If I give you 75 pages, it will come in at 90, it's guaranteed.

MR. FINCH: Your Honor, usually when I put pen to paper, I try to be short and brief and to the point.

THE COURT: Then you're a miracle, Mr. Finch.

MR. FINCH: But that's the deadline so at least it would be a somewhat of a shift from your current schedule. We'd like to get the deadlines in place, and if your Court has some guidance as to the page limitations.

THE COURT: Well, I'm a little concerned about getting replies the week before trial, the week before these arguments are going to be scheduled if there are going to be - I'm not sure how many people are going to be on the initial filing side. So I don't know how many replies I'm going to have, nor do I know why I need replies on Daubert motions that would seem to me that the issues are pretty clear. So -

MR. FINCH: Well, I am willing to forego replies,

and I'm pretty sure counsel for the debtor is not, and so, I think that the parties who will be filing Daubert briefs would be the ACC and the FCR will be filing Daubert briefs that Daubertize some of Grace's experts. I am sure the debtor will be filing Daubert briefs to Daubertize some or all of the ACC and FCR experts. I rather suspect the Equity Committee would be filing a Daubert brief. I'm not sure about the commercial creditors. So it basically would be, you know, two briefs from my side of the table over here, two maybe three briefs from that side of the room over there, and then there would be responses to each, and then a reply. So -

THE COURT: You've just killed 13 trees collectively in the process.

MR. FINCH: I understand, Your Honor, but, I mean, this is a major substantive issue in the case that all parties have very strong views of. I think it is, frankly, in some ways more complex and more page consuming to write these Daubert briefs than some of the briefs that Your Honor saw this past summer in the Federal-Mogul case from all these various insurance issues. I do believe that, you know, sitting down with my team of brief writers, 75 pages is something they've assure me they could get under, and, you know, if the Court says 60, we would certainly live with that.

THE COURT: Well, I have a problem with -

MR. FINCH: I haven't discussed the page limitations with Mr. Bernick or counsel for the other committees, this is sort of off the top of my head.

THE COURT: Well, I appreciate that, but I think the issue is this: I'm not exactly sure what difference in you or maybe I should start with a different question. Are you picking different experts to file Daubert motions against so that if the Committee picks three of the debtors' experts, and the FCR picks two - So, am I getting 75 pages on the same theme applied to different witnesses?

MR. FINCH: No, no, no. They would be - We would certainly write the briefs in ways not to duplicate, but we may be focusing on the same witness, but we would be taking different aspects. We would divide up the work with the FCR so that if we had - Let's say we picked on, so to speak, experts A, B, C, D, and E. We might talk about A, B, C, D, and E about issues 1, 2, and 3, and the FCR would talk about maybe A, B, and C, but only issues 4 and 5 or issues 0 and 1, or something like that. We would never - to not have any kind of overlap, and I'm sure the debtor and the commercial creditors and the equity would endeavor to do the same thing.

THE COURT: All right, so then, why don't we just set a maximum number of pages that can be filed, and you can divide up the pages however you'd like. In fact, I would

think that one joint brief by everybody who wants to file a Daubert brief with respect to the side that they're on would make the most sense; wouldn't it? Are you taking different - That's what I'm trying to get to, are you taking different positions? Is the Futures Rep going to have a different position on the Daubert issue than the -

MR. FINCH: I'm not sure they would have a different position, but they may have a different tact and a different approach given that they represent the future claimants and we represent the current claimants and there are certain differences in the drafting process that we've already identified.

THE COURT: Oh, all right.

MR. FINCH: So, maybe the easiest way to do it is to give, you know, our side - Mr. Mulledy and I since the Libby claimants are out of it. It would just be Mr. Mulledy and I, you know, 150 pages and their side - What do you think you need?

MR. BERNICK: I think that that's too much. Indeed, I don't think that we would seek to have 150 pages collectively for our side at all. I mean, I think, Your Honor, that the touchstone for our position on this is figuring out what it would take for Grace to write a brief on all the issues that have to be addressed and just a couple of comments on that. We look at these briefs as being because

the fit requirement in Daubert ultimately addresses the fundamental question of relevance, together with other prominent Daubert which is reliability. But this is really the appropriate time in which to set out what we think are the legal and factual contours of the estimation because we know that's been discussed on a more informal basis on many, many different occasions, but we're now in a position where the record is complete. Our thoughts are probably a little bit more matured, and all of the issues of relevance go, again, very centrally to Daubert. So, as we suggested last time, we think that our trial brief will not be very long. Indeed, I'm not sure we'll have a trial brief, but that the Daubert motions will basically enable us to convey to the Court our sense of what the architecture of the case is and then also address particular experts. We think we need 75 pages for that. Secondly, it is our further reflection that actually the time that's probably spent writing and for Your Honor reading these briefs this may even be - I hope will be the best time that Your Honor can spend before the trial begins. We know that the process of making your way through the expert reports has been difficult, and I think we committed last time -

THE COURT: If that's your idea of a good time, Mr. Bernick -

MR. BERNICK: No, I didn't -

THE COURT: - after this case is done, we need to talk.

MR. BERNICK: Yeah. It's pretty precisely in contrast to that that I'm suggesting that these briefs will be good use of the Court's time because I think it's up to us to take those expert reports and kind of using the language of the law and the like, also a certain amount of clarity can be added to the process. So, bottom line is, that we intend to use our Daubert briefs really as our roadmap for what is problematic both in terms of relevance and in terms of reliability in this case. I know that we can undertake to coordinate with the other folks who are at this table to assure that there is no duplication, and my informal conversations just now indicate they do not have an intent to file any kind of major brief. So, I think if we get 75 pages for the debtor, and we then have the ACC, if the ACC wants getting 75 pages for the ACC, and then other people can file non-duplicative shorter briefs, I suspect that we will end up with something that is considerably less than 150 pages in the aggregate. I know that that's true on our side of the table, and yet we won't have imposed what I think would be an unnecessary constraint at the outset on the total number of pages that either principal side of the controversy has to devote to the major brief. I really think it would be counterproductive to get into further allocations between the

different people who are sitting at the table. I suspect that so far as Mr. Finch and Mr. Mulledy are concerned they probably haven't gotten down to that level of detail either. If we have one principal brief on either side that's 75 pages, together with non-duplicative additional briefs, preferably not to exceed the total of say 40 pages, that we could get the job done, and I suspect that they could as well.

MR. FINCH: That would work, I think, Your Honor. I mean, I'm sure that would work. We'll make that work.

MR. BERNICK: And on the replies, we also devoted some considerable discussion to the replies because both sides, I think, wanted to push back for purely logistical reasons, wanted to push back the initial due date of briefs, and then that got us to the question of replies. Again, we specifically recognize that that would have the effect of putting yet additional paper before Your Honor shortly before the trial. My own sense at the time though was that it was inevitable that there would be in particular questions that people - or points that people would want to make on both sides regarding how the record was being characterized in the initial briefs. It's not so much that there would be a whole new issue that came up that hadn't been anticipated. It would be more that because we're dealing with a pretty fast record, people want to have the opportunity to point out

limitations or potential misconstructions made in the opposing side's briefs by way of reply. If you didn't get that reply, that would essentially mean that whatever people said in the opening briefs, unless they happen to meet issue precisely, would be all that Your Honor had before the trial started, and recognizing that it does put pressure on Your Honor, again, at least our sense was that that would be time very well spent. It is the debtors' belief in this case that by the time we're done with these briefs and we have the Daubert/opening statement argument at the beginning of the trial, Your Honor's going to have a pretty good view of where the joints are in this estimation, that is the key issues that will have to be resolved. There's a tremendous amount of legal complexity and factual complexity but much of it is derivative of a series, you know, pick a number 10 major issues that, I think, Your Honor's going to see in these briefs, and the better informed we think that Your Honor is, the more Your Honor, I think, will be able to tell us fairly early on, you know, okay, I get this, what about that, and/or, you know, I've already established this, what about that? The more we to do kind of front-end load this trial process so that Your Honor is really, really well-informed before we start will save us a lot of time at the back-end. So that's the overall philosophy that we have. We don't regard this just as a matter of submitting obligatory papers.

We're really trying to make it into a process that's meaningful for the Court.

MR. FINCH: So, that's still not a number of pages, but my suggestion, Your Honor, is that the response briefs would be the same number of pages as the initial briefs, and then the reply briefs, I think what I said was, 30 pages per party, but maybe Mr. Mulledy and I could do 30 pages per side and Mr. Bernick and the people over there could do 30 pages per side so you would get a total, you know, 30 pages from each side a week before the trial. So that takes care of the first -

MR. BERNICK: Is that all right with Your Honor?

MR. FINCH: Yes, would that be all right with Your Honor?

THE COURT: So I'm going to get two 75-page briefs, and not more than two 40-page briefs from each side as your opening and response briefs.

MR. FINCH: Yes, Your Honor.

THE COURT: And then two reply briefs of not more than 30 pages each.

MR. FINCH: Yes, Your Honor.

THE COURT: Yes, I can - Yes, I can deal with that. What I would like, however, and I hope - Don't make me live to regret this, please, don't make me live to regret this, but I think what would make most sense is that attached as an

appendix to these briefs, if you've got a citation to a specific example or illustration or something, that you attach the piece right to the brief. Don't make me go search for it through the docket because frankly with the amendments that have come in to these expert reports at this point, that's going to be a very difficult thing to do.

MR. FINCH: No, no, we would envision that as long as it didn't count against our page limitations, you might have - you might get a 75-page brief, but you might have lots and lots of attachments to it that are snippets of deposition testimony or portions of an expert report or, you know, whatever it is you're citing to so that you don't have to go back through the docket to get it. I mean that would -

THE COURT: That's fine. Do it in a binder format so that everything is tabbed so that it's easy to find.

MR. FINCH: Okay.

MR. BERNICK: Would Your Honor prefer - I don't know whether you've done this in other cases, would you have any desire to have an electronic linkage so that you can double click?

THE COURT: Sure. I would like to have an electronic link. I think that would be fine, but I'd also like to have a paper copy because, frankly -

MR. BERNICK: It's pretty fast, I think.

THE COURT: It is. Sometimes it's just easier to

put your fingers in the pages than it is - So, my staff is a lot better at using the electronic dockets for briefs than I am. I still - I'm still somewhat married to paper. I try not to be, but I am. So, I think it would be helpful to have the electronic version with the clicks and that does make it easier sometimes, but I would still like to have a binder format too.

MR. FINCH: Okay, thank you, Your Honor.

THE COURT: All right, wait, wait. Let me make a note, please. You say January 7th if fine.

MR. FINCH: Your Honor, Mr. Mulledy had a question for the Court.

THE COURT: Oh, sorry.

MR. MULLEDY: Your Honor, I'm just a little bit confused about the 40-page non-duplicative briefs and who gets to file those. As I understood what Your Honor was saying, we have a 75-page principal brief for each of these tables here, meaning the debtors' constituencies and the personal injury creditors constituencies, and that other briefs could be filed by entities other than those two principal constituencies in a non-duplicative way up to 40 pages. Is that correct?

MR. FINCH: No, that's not how I understood.

MR. MULLEDY: No, okay. Not at all then - That's why I raised the question.

MR. FINCH: I thought what the proposal was and I thought what Your Honor's order was that the ACC and the debtor would have 75-page briefs and then there could be 40-page briefs, for example, from the Equity Committee or a combination of the Equity Committee and the Commercial Creditors and from the FCR.

THE COURT: Well, I guess that's a question. Do you need more than 40 pages, Mr. Mulledy?

MR. MULLEDY: I don't think so. Just give me a moment. I think we can work within those constraints, Your Honor. I mean for us it's a matter of a different emphasis. I mean, the real problem I have is with the non-duplicative element of this. We will be seeing - We will have to say and make some of the same arguments that the ACC is making about the methodology that the debtors are employing here. That's inevitable because it is that methodology that affects the future claims analysis. Now, the emphasis will be decidedly different, but I don't want to have an objection that we filed a duplicative brief. To me it seems to make more sense to take a - to have a combined brief with a combined page limitation that would cover the ACC and the FCR and to have the same thing on that side instead of, you know, having arguments later about whether somebody's brief was duplicative of the principal brief.

MR. BERNICK: Your Honor, I guess, we don't need

that number of pages in one brief, and frankly, it would be - the coordination difficulties would be significant. It seems to me that if the FCR's concern is that they would be argued toy waived some argument that they don't make in 40 pages, then I don't have any problem with their joining in all the arguments that are made by the ACC for purposes of preserving their record. If the issue is does it take 40 pages to have a different emphasis, I guess that's where the question is. If you need more than 40 pages to add a different emphasis.

MR. MULLEDY: I'm fine with the page limitation. I think that is enough pages to make the different emphasis. What I'm concerned about is in the course of presenting that emphasis I'm going to hear an objection that what I filed is a duplicative brief because I'm taking the position that the debtors' methodology is unreliable and shouldn't be considered and that I know that would be part of the ACC's brief.

THE COURT: Okay, I -

MR. BERNICK: I have no desire to make such an objection because it's fruitless. I mean, Your Honor has set a 40-page limit. There's always been duplication from the FCR and for obvious reasons.

THE COURT: Well, I think to a certain extent, to put your argument in context, you may have to make some of the same arguments, you know, I think the Equity Committee

may end up having to make some of the same analysis just to put it in context without necessarily going into the same level of detail. I will do this. From the Equity Committee and from the Future Claims Rep I will take a 40-page brief, maximum 40-page brief. You may argue whatever you want in that 40-page brief. If anybody else is filing a brief, it has to be limited to 40 pages, and it may not be duplicative of what the other parties are arguing. If you've got the same argument to raise in that context - I don't know who else would be involved in the trials, but if somebody is, then incorporate by reference whatever the argument is from - that way I should have the whole panoply of arguments that everybody chooses to raise that I think will be actively involved in the litigation so that I'm not missing somebody. Is there another entity that expects to be actively participating in the trial?

MR. BERNICK: That would be pretty meaningful for us because we have operated, I think, under the expressed guidance of the Court that the estimation doesn't involve any particular claim. It involves the committees.

THE COURT: Well, I don't think it does, but let me find out.

MR. FINCH: Your Honor, the Asbestos Claimants Committee and the Future Claimants Representatives and their counsel are the only entities on my side of the table that I

anticipate appearing and putting on the evidence or making arguments against estimation arguments. So they're not going to see individual claimants or their counsel appearing in a role as counsel on behalf of individual claimants. You might have one of them or maybe two of them testify as a fact witness but you're certainly not going to have them appearing and representing their clients in the estimation. This is an estimation of Grace's aggregate asbestos liability. Every other one of these cases that I've ever handled, the plaintiff lawyers never even bothered to come to the room to watch much less put on their client's case. So this is not going to be -

THE COURT: I understand. If I may, please. I am asking everybody other than the debtor, the Equity Committee, the Future Claims Rep, and the Asbestos Creditors Committee, is there anybody else who's represented who is appearing either on the phone or here in court today who intends to present any evidence or participate in the briefing on these issues?

MR. PASQUALE: Here I am, Your Honor. You didn't name the Unsecured Creditors Committee.

THE COURT: I did not.

MR. PASQUALE: We have been and we will be continuing to participate in the estimation process.

THE COURT: Okay, are you going to file a brief?

MR. PASQUALE: I will be filing a trial brief. As I stand here today, I don't believe we will be participating in the Daubert motions, but I would like some . . . (microphone not recording) to submit a very short trial brief . . .

THE COURT: Okay, we're not to the trial brief.

MR. FINCH: We're not to the trial brief yet.

MR. PASQUALE: I understand. I just wanted to make clear the debtors was talking about using the Daubert and the trial briefs. So that's what I . . . (microphone not recording).

THE COURT: All right, thank you. Anybody else? All right, then it's not an issue. We've set the page limits, you can argue whatever you want within your 75 and 40 page limit.

MR. FINCH: Okay, and we're not going to see a bunch of insurance companies coming into this - I mean, there are thousands of insurance companies in the room here, so I just wanted to -

MR. BERNICK: And they always appear in groups; right?

MR. FINCH: They tend to.

THE COURT: All right.

MR. FINCH: Mr. Mulledy, I think, had one followup question.

MR. MULLEDY: If the Court would indulge me on one

more question. On the reply briefs, Your Honor, the 30-page limitation, how is that applied?

THE COURT: That's per side. So -

MR. MULLEDY: Side meaning?

THE COURT: The Futures Claims Rep and the Asbestos Committee is one side. The Equity Committee and the debtor is the other side, and since the Unsecured Creditors Committee is not filing a Daubert brief, they won't be filing a reply brief.

MR. MULLEDY: Can we divide that up 15 pages apiece in separate briefs, or do a collective brief of 30? Does Your Honor have a care?

THE COURT: I would prefer to get a collective brief of however you want to do it. If you want to submit, you know, 30 pages and say this is the ACC's view and this is the FCR's view and it takes 20 for one and 10 for the other, I don't care how you divide it up.

MR. MULLEDY: Understood. Thank you, Your Honor.

MR. FINCH: Okay. We'll divide that however we divide that.

THE COURT: You don't need to file one if you don't think there's anything -

MR. FINCH: That's true too, Your Honor. The second topic on the pretrial runoff schedule in the draft order I placed before you is a list of trial exhibits, trial witness

lists, and pretrial briefs, and here on December 21st, 2007, there would be the deadline for the submission of the trial brief, a list of all witnesses that a party intends to call as a witness at the hearing, along with a brief description, i.e., very brief description of what they intend to testify about or what the party intends to ask about them, and a list of all the trial exhibits that each side intends to offer in its case in chief pre-marked for identification. The parties shall exchange the copies of the trial exhibits on that date. At the same time the exhibits and the exhibit list will be sent to the Court, and then on January 4th, 2007, the parties would exchange authenticity objections to the exhibits as well as any stipulations regarding the admissibility of the exhibits. I rather suspect that there will be a large category of exhibits as to which there is no real dispute about the admissibility, but there will be categories of things as to which there are various - maybe not authenticity but certain objections to, but this is a deadline for identifying any authenticity objections we may have. Is that schedule acceptable to the -

MR. BERNICK: We're agreeable to everything.

MR. FINCH: No, no, this is a question is it acceptable to Your Honor, and then could there be some guidance on the page limits for the trial brief, and given that we have, you know, long involved Daubert briefs, I tend

to agree with Mr. Bernick, the trial briefs will not be as extensive as they otherwise might, but we do intend to file a trial brief to sort of lay out more like a trial brief you would - as opposed to a legal argument/Daubert brief.

MR. BERNICK: Your Honor had a concern last time, that you did want something, because we raised that same issue. Your Honor wanted something that would talk about the witnesses and what they would say. So, we included language in this draft that would provide that there would be a listing of the witnesses who would be called, and a description, obviously in somewhat general terms of what they would say to satisfy that request by the Court. Beyond that, we - There may be something that we would want to address in a trial brief, but right now I can't think of it beyond what we're going to address in the Daubert briefs.

THE COURT: What is it that you expect would be addressed in the trial brief, Mr. Finch, that's not going to come up in the Daubert brief?

MR. FINCH: Well, Daubert goes to the relevance and fit, and admissibility of expert testimony, but there is sort of - might even be in the trial brief, that you tell the Court the sort of overall story that the witnesses will testify to if they're allowed to testify, more than just, you know - If you're trying a bus accident case, you might list the four eyewitnesses where they see the bus accident, but

then in your trial brief you would say, This is what happened on such and such a day, and the bus ran over my client in the crosswalk, et cetera, et cetera. It's more of a -

THE COURT: An opening statement.

MR. FINCH: Yes, in some sense, and I think that, you know, given that we do have a Daubert brief that will identify for the Court all the various experts, or the ones at least that are the focus of this case and the -

(CLERK REPORTS AN EQUIPMENT FAILURE TO THE COURT)

THE COURT: Is it too far away? Is that better? Is that recording? Is it picking up, recording? Okay. All right. Wait.

MR. FINCH: Sure.

THE COURT: Please be seated. Okay, Mr. Finch, I'm sorry. I lost you where you were going to lay out what the trial's going to be all about, go ahead.

MR. FINCH: Yes, what the trial's going to be all about, that's the purpose of the trial brief, and during the break, Mr. Mulledy and Mr. Bernick and Mr. Pasquale and I had a discussion which sort of modifies what's on the piece of paper here and what the suggestion for Your Honor is that the ACC and FCR would file a trial brief on December 21st, not to exceed 50 pages combined, and then the debtor and anybody else would file a trial brief on January the 4th, not to exceed 50 pages combined.

MR. BERNICK: From the debtors' point of view, we think that the trial brief is even more paper for Your Honor to get through. We question its real value given the extensive Daubert briefing that will take place. We suggest that we not have trial briefs, and I think that there is still a strong desire on the other side to have trial briefs, so we then proposed a situation where they would go first and we would respond and that is fine with us. We think that that's a little bit better. We fundamentally don't think it's worth having Your Honor get a hundred pages of paper more. So, we think that it probably would be more appropriate to have something that's a little bit more summary in form, perhaps 25 pages or even 20 pages a side, just to give kind of an overview of how the case is going to go in. So, that would be our position is that we really try to truncate that process in light of the reality of all that Your Honor's going to have to take up here in this period.

THE COURT: Well, I mean, if what you're going to be doing is telling me your opening statement, I don't really need to read that. I'm going to hear it, and I think you're going to want to tell it to me anyway, so I don't really need to hear it and read it. If you have something that you need to say in the pretrial narrative, there is a place in the pretrial narrative for legal issues. That I'm willing to hear. If you think they're unique legal issues, I'm not sure

what they're going to be after you get the Daubert motions done though. I mean, it's just an estimation hearing except for that; isn't it?

MR. BERNICK: In light of Your Honor's statement just there be prepared to live with probably even less on the theory that we'd be in a position to probably represent to Your Honor that we would save our response to their trial brief until the opening arguments so that Your Honor is alerted to that fact, and then I'm not even sure we would need to respond to their brief.

MR. FINCH: Your Honor, there is a fair amount of evidence that's not expert in nature, and for that reason alone I think there needs to be a trial brief. I am - I believe we can get it done in less than 50 pages. I think 25 is too tight. I don't have a problem with 35 or 40 pages per side.

THE COURT: Okay. I mean a brief is supposed to be a matter of law; isn't it? I mean what's the issue that you're -

MR. FINCH: Not necessarily a trial brief, Your Honor. I mean, I have historically used trial briefs as a way to sort of tell my story of the case, sort of what's coming down the pike. It's not a legal brief. Maybe it's a trial memorandum is a better way to describe it, that lays out, this is what we will prove for Your Honor to consider.

THE COURT: That's an opening statement. Right, you want to do the opening statements in writing instead of orally?

MR. FINCH: No, I'd like to do them orally, but I think there are aspects of the trial brief - it will assist Your Honor at the opening statement to have the trial brief -

THE COURT: Sure, I will have read it once, and then you're going to repeat it to me by telling it to me the same time.

MR. FINCH: I'm not sure I would repeat the trial brief. I don't intend to be able to repeat anything twice, but the point is, Your Honor, I do, and my clients do believe that we need a trial brief and so does Mr. Mulledy.

MR. MULLEDY: Your Honor, I would just add, if I might, the simple point that I see this as a bench memorandum in a non-jury case where we want the Court to know, as the evidence comes in, what the legal background is for receiving the evidence. What is the law of estimation? I think that's a pretty important issue here. I'm not sure that gets covered with - in the way that we'd want that to be covered just in the Daubert context. So there's a Daubert piece that we see. We also see an overriding issue of what is the law of estimation? What law should the Court apply? I think we're going to hear from the debtors that - I don't think we're going to see eye-to-eye on that. I think that issue

needs to be crystalized in a legal brief, and I also think it's helpful for Your Honor to have a scorecard of what witnesses are going to testify and basically what they'll say. That's what I see this trial brief doing.

THE COURT: Oh, I definitely want pretrial statements that will lay out who the witnesses are and a summary of what they're going to say and all the exhibits pre-marked for identification. I did think I had asked for that earlier on.

MR. MULLEDY: You did.

MR. BERNICK: We're going to address the issue of what law's applicable in the context of the Daubert motions because you can't decide relevance or fit without knowing what law it is that we're working with, so, again, really I think that this is - Well, I've said what I need to say.

THE COURT: Okay. I think briefs limited to 40 pages should be sufficient after all of these other briefs on the Daubert issue, so, the brief part itself, however long it takes you to lay out who the witnesses are, I really don't want to know point by point what the witnesses are going to testify about. I simply want to know, are they fact witnesses and if so, on what point.

MR. FINCH: No, my concept of that would be expert witness on asbestos-related medical issues. Expert witness on a asbestos-related industrial hygiene issues. Fact

witness on, you know, trial settlement process or something like that.

THE COURT: Yeah, that's what I'm looking for.

MR. FINCH: That level of detail.

THE COURT: Okay, but I do want the exhibits.

MR. FINCH: Yes, and the exhibits, just so the record is clear, the exhibits would be the exhibits that each side would intend to offer in its direct case. It wouldn't include things you might use for cross-examination or impeachment, as to which you really don't know until you see the direct case of the other side.

THE COURT: Of course.

MR. BERNICK: Are we talking 40 pages a side, not 40 pages a party?

MR. FINCH: Yes, 40 pages a side.

MR. MULLEDY: That's what I understood the Court to say.

MR. FINCH: Forty pages a side.

THE COURT: Yes.

MR. FINCH: Then, the next item on the proposed order -

THE COURT: Oh, wait, I'm sorry. Pardon me Mr. Finch, I'm sorry for interrupting, but the schedule then you're going to do them at the same time or -

MR. FINCH: No, no, the schedule will be the list of

witnesses and the list of exhibits would be filed simultaneously on December the 21st. And then the ACC, FCR trial brief of 40 pages will be filed on th 21st. The debtors' quote, "trial brief", will be filed on January the 4th. But everybody would get Your Honor their list of witnesses and brief description of what the witnesses will testify to as well as the exhibits on December the 21st before Christmas.

THE COURT: All right.

MR. FINCH: The next item is basically a housekeeping item, relates to issues relating to the order of witnesses -

THE COURT: Okay.

MR. FINCH: - and, this is because the trial is sort of in various traunches, and many of the witnesses are expert witnesses whose schedules get booked up. We've negotiated and agreed a proposal that basically says, For the January portion of the hearing, and I'm sure the debtors' case will take the entire January portion of the hearing, the debtor will by January 4th, 2007 (sic), tell us not only, you know, the list of witnesses that it intends to call in that hearing, but as best as it can determine, the order of those witnesses, and then the list will be updated on a weekly basis, and then for the later portions of the hearing, whichever party is putting on its case, will give the other

side ten days prior to the resumption of the hearing a list of the witnesses that are going to called in that section of the case in the order that they will be called in and then at the end of each hearing day during the case itself, whoever's putting on witnesses, whichever party is putting on witnesses the next day, will tell the other side the names of the witnesses and the order in which they will appear, in case there's, you know, last minute logistical problems. So this is a way to make sure that the right lawyers and the right boxes of stuff are in the courtroom for each day. So that's spelled out in here. The next issue is another agreed issue which is issues relating to the designation of deposition or prior testimony. Given that a lot of the prior testimony won't be offered until later in the proceeding, rather than - and some of it may become unnecessary as the case comes in, what the parties have agreed to do is 14 days prior to the date that they intend to submit to Your Honor a deposition or prior testimony, they would give the other side a list of the deposition designations as well as a marked up copy of the transcript. Then the other side would have 10 days to provide counter designations and/or objections to that, and then the party proffering the deposition or prior testimony would have three days to provide any counter or counter-designations or objections to the counter-designated testimony, and then the party proffering the prior testimony

would submit to Your Honor the entire deposition or prior transcript with the parties' designations, debtors' side counter designations and the objections and counter-counter designations all tied up in one big bundle with one side using one color to mark what the designations are and the other side using another color, and, you know, I had proffered blue for the asbestos creditors and grey for Grace, but if they want to use a different color, that's okay with me, but the party proffering the testimony would have the obligation to submit all this to the Court in the color-coded copies of the transcript.

THE COURT: Okay, again, for this purpose, I'd like the information submitted in binders so that it's, you know, already punched and submitted and have the binders marked, it's much easier to handle that way.

MR. FINCH: The way I envision this and the way I've done it in other cases is, I think, frankly, in cases involving Your Honor, is to have a binder with the witness's name and the past testimony of John Smith. The first several pages are basically pleadings that have page/line, page/line designations from each side, and then a copy of the entire transcript from page 1 to the very end, but color marked up with the pages so designated.

THE COURT: That's fine. Okay, that's fine.

MR. FINCH: The next item on the proposed order is

something that is not agreed to which I'll pass for the moment, which is motions in limine other than Daubert motions. The final agreed item on the order relates to miscellaneous, and there are two items on that. One is that demonstrative exhibits must be produced to the opposing parties 24 hours prior to use. The other is that Rule 1006 summaries of voluminous exhibits must be produced to opposing parties at least 72 hours prior to being offered, and I believe that's all agreed to.

MR. BERNICK: Yeah, the only little bit of texture on the demonstratives is that I think we all anticipate that there will probably be some revisions to demonstratives even within the 24-hour period. So it's not designed to be a gotcha kind of thing, but it's designed to give fair notice of what the demonstratives are going to be in advance. I hope that there's agreement on that.

MR. FINCH: There's no disagreement here, Your Honor, although the revisions in there are revisions. If there's a, you know, two-page demonstrative exhibit 24 hours in advance, and then a 40-page demonstrative exhibit offered during the hearing, I may have objections to that. So, you know, fair notice is one thing, but completely adding to or revising something is something else entirely.

THE COURT: That sounds like there's no agreement, folks, because -

MR. BERNICK: It's just not practical. I frankly think that there's - there happens to be a little bit of ground that's somewhere between 4 pages turning into 40 pages. I mean inevitably in working with witnesses, you refine details, and if there's abuse I think it will become fairly obviously, and it will be raised before the Court, but we think it is unrealistic to expect that demonstratives will be final, final, final, no changes 24 hours in advance.

MR. FINCH: I agree with that, Your Honor, but maybe -

THE COURT: Mr. Finch, who is it that has whatever the wireless device is that's on? Okay, Mr. Finch, go ahead.

MR. FINCH: Maybe what we can do is demonstratives exchanged 24 hours - initially, I mean, good faith efforts of draft demonstratives 24 hours prior to use and then on the morning of use, the final demonstratives.

MR. BERNICK: That's fine.

MR. FINCH: Okay. Then the two open items on this order. One relates to the schedule for motions in limine other than Daubert motions, and the second relates to what I call the time trial proceedings, and I guess I'll take up the time trial proceedings first as to which there's no agreement on this, but basically, Your Honor has provided dates through now, May the 7th or May the 8th, in which to try this case, and it's our understanding from the Clerk's Office those are the

- that's the end. There's no more dates available after that. In the ordinary course of a trial, Mr. Bernick would start his case and he would go until whenever he's done with his case, and then Mulledy and I would put on a response case, and we would go until whenever we're done with that, and then Mr. Bernick would have a rebuttal presumably and if there's any sur-rebuttal, people just to get the trial done, and it goes however long it goes. Here, Your Honor has put, as I understand it, a limit on the amount of time the Court has available to give the parties to try the case, which is perfectly within the discretion of the Court, and I think it's a sensible thing to do. My -

THE COURT: That's in the eye of the beholder. In my view I haven't put any limits whatsoever on this process. I've committed two or three days a week from January through May, virtually. That is an impossibly long time. It shouldn't take anywhere near that length of time to get this proceeding finished.

MR. FINCH: I agree with that in principle, Your Honor, but the - given that there is a finite amount of time, it seems to me there has to be a mechanism in place to make sure that the time we do have it allocated fairly between the parties.

THE COURT: Okay.

MR. FINCH: And, you know, through no fault of

anybody, what if we get to 14 days into it and the debtor's still putting on its case, and then it's unfair to my client and to Mr. Mulledy's client to say you only have 4 days to finish your case, Mr. Finch. So, my proposal is if we have some kind of an agreed mechanism - or not agreed, court ordered mechanism up front to put some discipline on the proceedings and make sure that it's done by the time that the Court thinks it should be done, and just by - in way of passing, my first experience in a time trial was in the Armstrong proceeding. The Federal District Court there citing some Third Circuit case law imposed time limits on the parties of 7 hours per side for expert testimony and 2 hours per side for fact witness testimony. Now, admittedly there were far fewer witnesses in that case than this one here, but the basic concept was that if I was standing up moving my mouth, my side would be charged with that time. Mr. Bernick is standing up moving his mouth or Mr. Pasquale or Mr. Horowitz or whoever else for the Equity Committee, their side would be charged with the time. That a courtroom deputy or some other officer of the Court would keep track of this using a chess clock or some other device. At the end of the day there would be a reconciliation with the parties as to how long each side has taken, and that the proposal would be just to divide 20 trial days times, you know, estimated 7 hours trial time per day in half, and so we each have 20

times 7 is 140 divided by 2 is 70 hours per side. I think there has to be some kind of mechanism up front to make sure that we get done with this by the end of the cutoff. You know, I frankly, Your Honor, I did not like the time trial proposal in the Armstrong case until I actually did it, and then looking back on it, I think it made a lot of sense, and it was a - sort of a very easy way for the Court to impose some rigor on the parties and make them get things done in what is a reasonable amount of time, and I strongly commend to Your Honor to put into place something like that here. It's a very simple, mechanically to do, it's fair to both sides. There's, you know, you can use your time however you want. If you want to quote from the King James version of the Bible you can do it, all subject to relevance and admissibility, but there's no limitations substantively or how you divide the time up between Mr. Mulledy's case and my case or whatever, but it does put a limit on the overall trial and puts a framework around it. So that's my proposal for the time trial, and then as to the second non-agreed item, which is for motions in limine other than Daubert motions, we just need to know Your Honor's preference. One suggestion had been that we just file motions in limine sort of on a rolling basis. I don't tend to like that approach. I would prefer to have a deadline for filing motions in limine. Maybe you could have deadlines on each traunch of

the trial, but just to have no limits on motions in limine strikes me as, you know, leading to lots and lots of paper being filed for no real purpose. I mean normally motions in limine would be due sometime - on evidentiary issues would be sometime before the start of the trial. And so, my proposal would be that motions in limine would be filed at the same time that the initial trial brief is filed. If the debtor has motions in limine against our case, he files it December 21st. If we have motions in limine against their case, we filed it December 21st. But that's just, you know, there's no agreement, no negotiation really about that, that's just - I'm asking the Court to pick a deadline for motions in limine. And with that, unless Mr. Mulledy has any comments, anyone else on our side has any comments, we'll cede the podium to my adversary.

THE COURT: To help me with the last issue, at the moment, what types of motions in limine other than the Daubert motions are you contemplating?

MR. FINCH: Well, there is a motion in limine about whether or not the debtors' past settlement history is relevant and admissible for purposes of estimating its liability. That's the way it's been done in other cases. When a party enters into a settlement, it doesn't admit to a tort liability, but the settlement agreement itself creates a contract liability. Just like when a debtor runs over

somebody with its truck and then that person files a proof of claim form with the Bankruptcy, sometime in the bankruptcy case they do a settlement agreement. They have a 9019 motion. They settle that case for $5 million or whatever they settle it for. That becomes a liability that's a schedule on the debtors' books. It's a settlement. It's a contract. It's not a tort liability, but it's a contract liability, and when the debtor was in the tort system in a solvent company, just like every other solvent company, it estimates its liability based on its expected future cost of paying claims. In most cases, 98 percent of cases get resolved by settlement, not by trial, and so the real world best evidence way to estimate liability is to use a company's settlement history. That's a motion in limine. Mr. Bernick has pretty much assured us he's going to file that motion. Whether he wraps it up with a Daubert motion, I don't even know if it's a Daubert issue, but I've got the flip side of that motion. You know, I would tend to file a motion in limine saying, That methodology is admissible or that evidence, the evidence of the debtors' settlement is not barred by 408 or anything else for purposes of estimating the liability. That's a motion in limine that I can foresee physically tied to the Daubert brief necessarily, or it doesn't have to be. I don't think it is, and so, you know, there may be motions in limine relating to foundational

testimony from certain fact witnesses whether they know what they say they're testifying to. There may be motions in limine that come up on, you know, hearsay issues within a document or a series of documents. Motions in limine relating to the - some of the materials that has been gathered in the case. I don't know whether I'm going to need them or not until I see the debtors' final exhibit list and list of witnesses. So that's the kind of motion in limine, sort of evidentiary issues that aren't Daubert related to experts. They come up. They inevitably come up. Usually by the time you get the other side's - and maybe my proposal having these due on December 21st is a little premature. Maybe the thing to do is have them due in January after we've seen their list of exhibits, they've seen our list of exhibits, and then the Court wouldn't necessarily rule on the motions until the party proffers the piece of evidence. I just think there needs to be somewhere in the schedule a date, whether it's January 4th, January 7th, January 10th, whatever, for filing motions in limine. Mr. Mulledy wants to comment.

MR. MULLEDY: My only added comment to that, Your Honor, is it should be before the trial begins because any procedure that contemplates a rolling handing across the counsel table each morning a new motion in limine is going to be a major distraction, to say the least. We have limited

resources, all of us do, to try this case, and we're going to be, I'm sure, performing legal research for our own presentations to divert them away from that and now start writing an opposition brief on a limine motion that was handed to you the morning of trial for an issue that is likely to come up that day or the next day is just a disruption that none of us need, and I think it's unnecessary. If we know that there are going to be issues about evidentiary matters in this trial, we all know what those issues are right now. We can brief them and get them out of the way, and the rest of it can just be handled on an exhibit-by-exhibit basis noting objections for the record.

MR. FINCH: With that, Your Honor, I'll sit down. Thank you.

THE COURT: Mr. Bernick?

MR. BERNICK: Yeah, I think that both of these issues are good issues, but what they're being put to Your Honor as if there's kind of a black and white situation and there's nothing between and that that solution, the white solution and the black solution or however you take it, is to have something decided in advance by way of a regiment or routine that makes all of this very predictable, and I think that in neither situation is that either workable or is that appropriate. With regard to the time, this is obviously different from other cases. If you take a look at the sheer

volume of the expert materials that are involved in this case, to say nothing of the factual materials to be submitted to the Court, I think actually the concern that most of all animates Mr. Finch's remarks and the remarks of the other side is that the trial dates simply will not be enough. So that it's not a question of having a surplusage of time, it's running out of time. I believe that if all issues and all evidence that have been the subject of discovery or put before Your Honor you literally couldn't recite them all in the period of time to be involved, in the period of time that's set aside for this trial. So, obviously, something has to change in order to get this thing done in a reasonably prompt fashion. What they propose is basically deferring how that process takes place and basically saying instead, we'll just run it by the clock, which basically means that no decisions are really made as the case proceeds about what the Court is most interested in and what issues are raised in importance to the Court and instead everybody kind of makes their own decisions based upon how much the clock is running out. The problem with that is, the clock doesn't reflect the reality of what happens during a trial, which is that certain issues become important. Other issues become less important. The issues that are important warrant more time and attention. The ones that are less important obviously less time, and in that fashion, basically, people make up their

minds about what's worth pursuing, and I believe that Your Honor is going to - I think it would be terrific and even dispensable to getting this trial done on time for Your Honor to kind of react and give us notions about what it is, what evidence, what issues are you most focused on, and that's in a sense of having all this briefing in advance. The concern I have with doing it by the clock is very simple, which is that there are conceivably, you know, 50, 60, 80 different little issues. There are hundreds if not thousands of different pieces of evidence. It's very easy to put a matter at issue to make a contention. It's very difficult in some cases to as efficiently to address that contention or that issue, and I don't want to be in a position where my client all of a sudden faces issues. There are significant issues - and a whole slew of them, and now the clock is going, and what actually drives our ability to respond is how many issues have been put on the table, all of a sudden, not knowing where, in the sense Your Honor's going or what's going to be important in this case and the clicking of the clock, and I've been in the situation before. It's not an uncommon situation where you have trial by the clock. In this case it should not be a function of getting cutoff that an issue gets decided, that is the issue has been raised. Some evidence has been submitted, but the other side has not had the opportunity to respond. So I think as a practical

matter, what's going to be very important here is for - is for the trial to start and for the parties to make judgments about where they want to focus their case, but to have, in a sense, a more interactive process with the Court to focus what it is that we're really talking about, what it is that's going to make a difference to the Court's decisions so that we're not operating by a clock that artificially constrains the due process right of a party to respond to any number of scores and scores of issues that are coming up. If we tried all of the issues again that are in these expert reports and all the evidence that relates to them, it is plain that the trial days cannot begin to be enough. This case will be not different from many, many other very lengthy and very complicated bench trials. So to get to the point whereas Your Honor obviously hopes and expects will be able to take fewer trial days, that's not going to be because a clock is ticking. A clock is indifferent to the substance of what's going on. It's because the parties do a good job of putting the issues before Your Honor, and we get some feedback or some indication from Your Honor about what you've already heard enough of and what it is that you want to hear going forward, and on that basis the parties can decide on their own what it is that they really need to pursue. Now, it may become important at some time for Your Honor to constrain the amount of time that one party takes on a certain subject or

that one party takes in the aggregate. That is something that Your Honor is totally and completely capable of doing on an informed basis using true judicial discretion. A clock is not judicial discretion. A clock is an artificial constraint, and we'd be very much against the idea of putting this case on the clock. We think it creates way, way too many opportunities for unfairness, and we don't think it's necessary and appropriate given the length of time that's been dedicated to the preparation of this case. With respect to, and I don't know - I'm happy to go on and talk about the motions in limine. My remarks are similar, but if Your Honor had questions with respect to time or reactions on the time, I can address those.

THE COURT: No, go ahead.

MR. BERNICK: Okay. With respect to the motions in limine, in a sense, it's very much the same kind of thing. We think that the principal issues that relate to the admissibility of expert testimony will be raised by way of the Daubert briefs. There may be additional in limine issues in the sense of issues of general importance to the admissibility of evidence in the case. Mr. Finch has identified one, although Your Honor already has actually given us some guidance at the last hearing on that issue precisely. There may be some others. Ordinarily, you would not have motions in limine that dealt with those big issues

in a bench trial - I should say, normally in a jury trial, if you have motions in limine that dealt with big issues of admissibility, you don't even want to have them come before the jury so they're handled all in advance and that creates, obviously, a major burden, but it's necessary because the jury needs to - there needs to be guidance before opening statements take place. Here we have a bench trial. So there's not an issue of somehow keeping matters from coming up in court, and that gives both sides a lot of flexibility. In the same fashion, Your Honor doesn't have to decide Daubert motions. You can hear the Daubert motions and you've already told us you're not going to decide them, in the same fashion we can have issues, other issues of admissibility, it would come up during the course of trial, and they could be briefed at an appropriate in time if they're going to be briefed and decided at an appropriate point in time. To force all matters that might be taken up in limine, again into this period of time before the trial starts, is just completely unrealistic. As Mr. Finch has acknowledged in the last caveat that he made towards the end of his remarks, we're going to be very busy doing all kinds of different things. The last thing that I think we need is to have a deadline that says artificially, you've got to give me all the motions before the trial starts. I suspect that what will happen is that beyond the Daubert motions there will

probably be a handful of major issues going to admissibility that warrant having some significant briefing, and I think it's then up to the parties that intend to raise those matters to raise them in a timely fashion, and that does not mean, again, black/white. That they all of a sudden all get raised in the morning that the issue is going to come up by exchanging a brief across the courtroom. That would obviously not be timely, and we're certainly not contemplating anything of that nature. So, I think that the real choice is do you force the prosecution of any written motions in limine to take place before the trial even starts or do you impose the burden on the moving party to timely make a motion by way of brief for those matters that will in fact be briefed. With respect to all other matters, there are all kinds of issues of admissibility that will in fact get resolved, not just during the morning, but during the course of the trial itself, and that's not something that I take to be within the scope of the issue we're discussing now. We're discussing now our significant briefs on issues of general application, and it seems to me that the more prudent way to deal with that, given the fact that this is a bench trial, is to have them made on motion at an appropriate time reasonably in advance of when they'd have to be decided, so that the other side, in fact, does have the opportunity to submit a timely responsive brief. There are going to be all

kinds of gaps in the schedule so that there shouldn't be any reason why we've got significant briefs that are filed without notice on the morning when Your Honor's going to be presented with the issue to decide. So that would be our proposal about how to resolve the motion in limine issue.

THE COURT: Anybody else?

MR. FINCH: May I respond?

THE COURT: Mr. Finch.

MR. FINCH: On the motion in limine issue first, reasonable notice is a fine concept but my experience is, in the middle of a trial, it's better to have fixed and hard and fast rules, and whether you want to say motions in limine relating to the first traunch will be due January 10th, we have to have a schedule in place so that we don't just have, you know, reasonableness being in the eye of the beholder. That's why I asked Your Honor to set a firm date for motions in limine. If you want to do it in traunches, that's fine too, but I just - It makes me very uncomfortable to have no schedule at all.

THE COURT: Well, let's go back to the list of witnesses who are expected to be called and when these witnesses are going to be identified to the other side and then to the Court, because I'm not - I mean it just went by me pretty fast, so -

MR. FINCH: That would be December 21st under the

schedule, Your Honor.

THE COURT: All right. So, I would assume that by December 21st if you've got motions in limine with respect to witnesses or documents that are going to be on the January list, you ought to be able to file motions with respect to any of those significant issues by the date or within so many days after that list is divulged. And then, the same with the March and April trial traunches.

MR. BERNICK: Well, Your Honor, I think that the list that we have is on the 21st is trial briefs, all witnesses -

MR. FINCH: All the witnesses.

MR. BERNICK: It's not the ordering, and then with respect to the ordering of the witnesses, this is January 4th for January. So on the 4th we would indicate those people expected to be called simply during the January portion of the hearing.

THE COURT: Right, and you're not going to have witnesses probably what, the first three days? Or first two days at least of trial?

MR. BERNICK: Well, I think actually we probably will have witnesses at least during the second and third -

MR. FINCH: Second day of trial.

MR. BERNICK: Second, third, and fourth days of the trial in January.

THE COURT: Well, tell me what those dates are.

MR. BERNICK: That's the - they are the 16th, the 23rd, and the 24th, if memory serves.

THE COURT: Okay. So, if you disclosed - if you filed your motions in limine with respect to witnesses that were going to be called the 16th through the end of January, whatever those dates were -

MR. BERNICK: Right.

THE COURT: - by, well, the January date would have to be shortened if you're not going to call the witnesses - I'm sorry, to disclose the witnesses until January 4th, that would have to be a pretty shortened date to make that meaningful.

MR. BERNICK: That's part of the reason. I mean that - the burden is, in that instance because they're my witnesses, likely on the ACC and the FCR to go ahead and do that, and they won't know exactly - Well, they could probably do a pretty good job in determining what the exhibits would be, they wouldn't necessarily know that by that time because remember, the exhibits are -

MR. FINCH: The exhibits - all the exhibits we'd have by December the 21st.

MR. BERNICK: But you wouldn't know which one belonged with which witness. You'd probably suspect if you could do that. I also don't know what necessarily might be

used by them on cross-examination. Again, I don't think we're really talking about the issues of admissibility with respect to particular documents or for that matter even maybe particular aspects of the testimony. What we're talking about is an issue that's of such broad application that it warrants a brief.

THE COURT: Right. Yeah, I don't expect that, for example, your hearsay objections unless it's going to take a brief, you're going to be making them by a motion in limine -

MR. FINCH: No, probably -

THE COURT: - or relevance to particular witnesses. That's going to come up by way of trial objection not by way of a motion in limine.

MR. FINCH: Right, right.

THE COURT: So, I think Mr. Bernick's correct about that. You're going to reserve motions in limine for the really overarching issues.

MR. FINCH: I agree with that, Your Honor, but I do think that there needs to be a date in January for the January portion. A date in late February for the March portion, and a date in late March for the April portion.

MR. BERNICK: I think that counsel is making an argument that's really going to have much more bite on them. I really think, and maybe this is an area where it would probably stand some more discussion. We could probably agree

to something that says that in any matter that is raised by - any matter of admissibility that is raised by briefing shall not be heard by the Court until the other side responds and that response should be - 7 days should be allotted for that response to be made so that no one's getting briefs the morning that a matter has to be decided, and basically we would have a fairly shortened period for motions in limine that would basically give anybody who is responding to a motion in limine a week to put together a response. And if you want to be busily working on the 408 issue, I suppose that can be done although I suspect that that's going to be your motion not ours because I think Your Honor's already given us sufficient guidance on that.

MR. FINCH: Your Honor, I think maybe the best way to handle it for today's purposes for purposes of getting an order to you to sign tomorrow or the next day is for motions in limine just to leave that, you know, to be determined by the Court after further discussion between the parties. I think there are - the real concern was that we have sufficient time to respond to motions in limine and to tee up motions in limine, and if what the - I think I understand Mr. Bernick's proposal, and I think that might make sense, but I'd like to talk about it with the people in my firm and Mr. Mulledy's firm who are actually going to be writing more of the briefs than I may.

THE COURT: Okay, well, I have a concern in this too.

MR. FINCH: I understand, Your Honor.

THE COURT: That is, Mr. Bernick's saying that the other side ought to have 7 days to respond, that's fine, but I need some time to read it. I don't want to be handed it the day of the hearing neither. So, the 7 days to respond in my view means that it's going to have to be filed a couple of days in advance, and the problem is that in some instances, you've got 3 days of trial testimony in a row, and I'm not sure exactly what time we're going to break up in those days, and I can tell you, some days I may get three briefs at night, some days, if you beat me up the way you do in some hearing dates, I'm probably not going to be able to read briefs at night because I won't understand the word that I'm reading at that point in time. So -

MR. FINCH: Well, Your Honor, one of the, I guess luxuries that we do have is that this is a bench trial, and the practice that I think Your Honor has followed under cases is that you can hear testimony sometimes subject to a motion to strike it later. So even though it's styled a motion in limine, maybe it's a motion in limine and then the - if the motion is filed, let's say on just a hypothetical, pick a day, March the 4th, then the response is 7 days, due later on March the 11th, and the guy actually testifies on March the

6th, then you have the argument about the motion in limine/motion to strike on March the 12th, and the testimony is stricken if the Court agrees with the party proffering the motion in limine.

MR. BERNICK: I would strongly object to that. I mean, that defeats the whole purpose for the exercise. It means that we're wasting testimony time. This should be done so that the matter is decided and then it helps us figure out what we're going to be doing next.

THE COURT: Well, okay, for my purposes, I would like whatever briefs - motions in limine and briefs are going to be filed, to be filed the Friday before whatever the next week's hearings are going to be. So that I have the weekend to read whatever's coming up the following week. That should, I think, give you all sufficient time to get the documents filed and get me an opportunity, hopefully, to read them, but when I say Friday, I mean Friday morning.

MR. FINCH: That means the response has to be to Your Honor by that time.

THE COURT: That means everything has to be to me.

MR. FINCH: So there would be an initial brief the Friday before the Friday and then the response that Friday.

THE COURT: Correct.

MR. BERNICK: That would be fine with us.

THE COURT: And there will be no replies.

MR. FINCH: That's fine with -

THE COURT: I'm not having replies, don't ask.

MR. FINCH: That's fine with us.

THE COURT: The answer is no.

MR. FINCH: That's fine. For example, the first week of trial, if I have any motions in limine, the first week of trial starts on January the 14th, the prior date - the Friday before that is the 11th -

THE COURT: Right.

MR. FINCH: So, I'd have to have it on the 4th.

THE COURT: And that's the day the designations are due, so that's not going to work in that instance, so I think for that one, your designations are going to have to be done - pardon me, your motions in limine with respect to those designations, you'll have to do on the 7th, which is the following Monday.

MR. FINCH: Following Monday. I may not have a motion in limine for the first set of the debtors' witnesses other than our Daubert briefs, but until I - I'll get his exhibits on the 21st. I'll see all of his witnesses on the 21st and I'll see the exact order that he's going to call them in, in January. I think that's workable.

THE COURT: Right. You won't see the order though until January 4th, which is the day that normally your motion in limine for that - the first week of trial would be due.

So what I'm suggesting is, just for the first one, your motions would be due the following Monday, which would be January 7. The responses would still be due January 11. That shortens both of your time, not mine.

MR. BERNICK: Okay. That's fine.

MR. FINCH: That's fine.

THE COURT: Okay.

MR. FINCH: And then finally on the time trial proposal, the response Mr. Bernick made was saying that this potentially raises due process issues and that the guidance from the Court would be helpful to the lawyers in putting on their case. I - first of all, I don't think it's a due process issue. I think everybody's going to have the process that is due to them in the 20 days that the Court has given us, but secondly, deciding what's important in your case and how the judges are reacting to the evidence you're putting on is something a lawyer has to do in every case, and in every trial I've been involved in, whether it's a time trial or not, the Judge puts constraints on what people are allowed to do and can't do, and so, what I'm saying is, this is a way that is fair *ab initio* in advance to divide up the time. I don't know if there's any other way to divide up the time at the front. If Mr. Bernick thinks he, you know, wants more time at the end of the 20 days, he can make a motion to Your Honor to get more time. If on the other hand, he thinks, you

know, I've put five issues on the table, he's only got ten hours left, part of a lawyer's job is to figure out what's important and what's less important and structure your case accordingly. So I do think there has to be some kind of governor at the front, and I think the time trial is the best way to do it in this instance, you know, that's obviously a - it's not something that happens in every case, but I do think it's within the inherent power of the Court to order that.

THE COURT: Well, I think it's within the discretion of the Court to do it, Mr. Finch. The trouble I'm having in this case is, and I haven't finished reading all the expert reports, but it does seem as though you're trying two entirely different cases, and that's why I'm having some difficulty with figuring out the concept of this time trial here. It almost seems as though - just from looking at the expert reports, obviously, I don't know exactly how the evidence is going to come in, but from looking at the expert reports, it looks as though the debtor has its view of the world and your cross-examination of the debtors' witnesses is going to go down a track because that's the debtors' view of the world and you're going to attack it however you think it ought to be attacked, and then your side has its view of the world, and you're going to put on your view, and then the debtors' going to attack it however it thinks it has to be attacked, but the two views of the world are really not the

same.

MR. FINCH: I agree with that, Your Honor. My only caveat or observation is, I believe their view of the world is irrelevant to the issues the Court has to decide.

THE COURT: Well -

MR. FINCH: But, you know, I agree that there are definitely two ships crossing in the night. Maybe they'll crash somewhere. I assume that they'll be shooting each other as they go by each other, but I guess my plea for Your Honor is that I would like some kind of governor on the time up front so we don't have a situation where we're 16 days into this and Mr. Bernick is calling his last witness and then you turn to Mr. Mulledy and me and say, you know, you've got five days, guys.

THE COURT: Gee, guys, sorry.

MR. FINCH: Yes.

MR. BERNICK: But that's not an issue. In fact, we're actually concerned about exactly the same thing, which is if they then raise the - Sorry.

MR. FINCH: Sure.

MR. BERNICK: If they decide of the 35, 40, 50, 60, 80 different issues that they're all of a sudden going to make a big deal towards the end of their case about 3 of those issues that we thought to be of absolutely no consequence, but Your Honor's fascinated with them, we don't

want to have the clock cut off our response to those very important issues. And I would say that Your Honor's observation is not only correct, but that's only the beginning of it in a way because while there are two very different visions of how estimation and what this estimation in particular should involve, the issues that drive who's right is not just one issue and it's not even just one factual or legal issue. It is a series of legal issues. It is a series, perhaps less so a series of factual issues. And Your Honor may take those first 5 or 6 legal issues and decide them in a way that cuts against both sides, and then we'll have to figure out what to do with that. So this is very, very much a moving picture where Your Honor in a sense can't even decide, well, I adopt their view of the world or I adopt the other side's view of the world. Your Honor's going to have to decide a series of discrete legal issues that are very interrelated and will have a variety of different potential effects on both visions, and then, there's another part which is that you have two different visions and then both sides will probably respond - I know that we have, I suspect that they will also - both sides will also respond to the other side's world is that we're at least in part accepted and say, They still did it wrong. So that if you use the Peterson model, well, okay use Peterson's model, they're wrong about the answer. Or they'll say the same

thing about Florence. So there are many, many different ways in which Your Honor can go down the path of resolving different issues. We think, obviously, on balance, that they've got to win almost all their issues before their vision is viable. They probably say the same thing about us. What is very certain though is that again, as Your Honor has seen, if all that happens is that we go down the road of putting everything in, including making our, quote, "judgments" - but this case isn't like most cases. It's a very complicated case. You can always make judgments about this issue is important or that issue's important, but the real thing is what's important to the Court so that the Court feels comfortable with how this case is being played out, and that's not something that should be determined by how the clock is ticking. It ought to be determined by a little bit more, you know, focus process of focusing on what issues Your Honor is concerned about, what issues the parties select as being important and having adequate time to respond to that. All that said, I agree with Mr. Finch's concern, which is that nobody should be in a position where in a sense they're not getting the time that they fairly and appropriately need to deal with the evidence and the issues that are put before them. And as a consequence, it would not be something that we would believe would ever take place, that we would use up most of the trial days and then say, Well, okay, you know,

they've just got 4 trial days left. That's obviously not acceptable either. So, I think what's probably going to happen is that we'll both develop an initial approach for what witnesses we're going to call as part of our case. We'll probably do it on the theory that we're only going to get half of the trial time, including cross-examination, and we'll start to make draws on who's going to testify and in what order in order to get it done within this period of time. That's certainly what we're going to try to do, and as it goes along, I think, particularly in the beginning part of the case in a sense it's going to be where there's the greatest inefficiency because we'll know less about how things have turned out and the kinds of questions that Your Honor may have early on in the case. So in a sense, we're the ones who are going to be bearing the burden of proceeding when the case is the least focused. That's something that we're extremely mindful of, and at a certain point, we're going to say to Your Honor, Okay, we think that this is where it's going. Here's how much time we think we're at. Maybe at the end of each week we can update the Court - both sides can update the Court on how much time it's taking so that we don't wait until being 16 days into 20 days before the problem is raised. It ought to be a continuous process of examining where the case is going, obviously mindful of Your Honor's statement today that it's got to get done fast. We

all, I think, are totally sympathetic with that. We want to get it done promptly, but you can't assure that being done in a fair way by setting the clock. So our proposal would be that at the end of each trial week we have a short discussion with the Court on what's happening next in our case. How long our case is going to take, and you can see it as it comes along. I think to expect to do anything more on this in advance is again imposing an artificial constraint that doesn't do justice to the issues that we have to deal with.

MR. INSELBUCH: Your Honor, Elihu Inselbuch for the Asbestos Committee. I think Mr. Bernick is probably right. The disadvantage of doing it this way though is it removes a certain amount of discipline that the parties would have to impose on themselves. So long as the Court is committed to providing how many additional days as might be necessary to give everybody a fair crack here, then we can't argue with you that there is a need to set a time trial.

THE COURT: I'm going to retire in not more than seven years, Mr. Inselbuch.

MR. INSELBUCH: I may not hang on that long, Your Honor, but I'm holding on by my fingernails. Your Honor, I think Mr. Bernick's idea of reviewing after each section of where we are and how much more we're going to need, is a very good one, and I would just say this to the Court also that, planning additional days for this trial is not something

that's easily done. Either the calendar commitments of all the lawyers, the experts, the Court, it's complicated, so, if somewhere along the way in March it's beginning to look like you might need some more days, we should start finding them.

THE COURT: Well, I think if it's going to look like there are additional days needed, for my purposes, you're going to have to find them now because this is not the only case I have that's asking for 20 trial days, and that's the problem because, you know, bankruptcy judges typically are not in for long trial dates. That's what you do on the other side of the street not on this side of the street.

MR. INSELBUCH: That's what motivated us to propose the time trial because there's no way - We really believe that we should be able to complete this trial in the time already committed. I think Mr. Bernick believes that as well, but neither side is prepared to say, Well, if you let my adversary use as much time as he might want, I won't be left with enough time.

THE COURT: Well, I guess - This is why I am having some difficulty. The debtors' theory, from what I can ascertain so far, is somewhat novel. I, at least -

MR. INSELBUCH: Somewhat?

THE COURT: Yes. So I haven't - I'm not exactly sure how long the presentation of this type of case is going to take because at least I personally haven't been through

this type of an estimation hearing exactly the way the debtor is proposing it as it seems to be coming out in the expert reports so far.

MR. INSELBUCH: No one has.

THE COURT: Well -

MR. BERNICK: Your Honor, I am happy to go through all this -

THE COURT: No, wait. No, it's not a Daubert issue. I'm not raising it for that purpose. I'm attempting to get the issue of the time needed to put the evidence in, and so, it may take me a bit more time to understand what the debtor is doing simply because it doesn't follow the normal track that this Court's familiar with in the exact sense that the Court has seen it before, that's all. That's all I'm saying. I'm not making any judgments, good, bad, or indifferent. It's simply that from my own experience, I'm more familiar with what the other side is attempting to do. It doesn't look to me, from the other side's expert reports that your case ought to be taking - direct case, ought to be taking a huge number of days. Your expert reports seem to be following the more traditional mold in which the expert testimony for estimation hearings hasn't taken all that long. So, that's why I am somewhat at a loss. If -

MR. INSELBUCH: Well, we are in the same position you are, Your Honor. We have to cross-examine the debtors'

case.

THE COURT: Yes, you do.

MR. INSELBUCH: We have to oppose the debtors' case. We have to rebut the debtors' case, and we have the same uncertainty about how long that might take.

THE COURT: Okay. So, if we start with the proposition that the debtor needs X days for its case in chief, notwithstanding cross-examination, just to put on its evidence in its case, and your side needs X days to put on its case in chief, forget about cross-examination, just to put the witnesses on, I would think that as experienced trial lawyers, you probably have a pretty good concept of how long it's going to take you to examine your witnesses. Why don't you tell each other that fact, and maybe that gets us a start at how long the cross-examination is going to take because traditionally, limiting the cross-examination, focuses the cross-examination a whole lot better than not limiting the cross-examination. So, maybe that's a way that we can begin this process of winnowing down what an appropriate time for trial ought to be.

MR. INSELBUCH: Are you directing us to do this, Judge?

THE COURT: Yes.

MR. INSELBUCH: Very well.

THE COURT: Okay, but I mean to be realistic about

it, not to, you know, put fluff in. I expect it to be an honest fee petition type of process.

MR. INSELBUCH: Well, then let's work that through, that's going to take us a little time to do -

THE COURT: Yes, it will.

MR. INSELBUCH: - and to sit down with each other and present that, and at some point then, you'll want us to come back to the Court.

THE COURT: Yes.

MR. INSELBUCH: And tell you what we've learned from all of that.

THE COURT: Yes.

MR. INSELBUCH: And what that then suggests needs to be the next step in that process.

THE COURT: Yes, because I think that will at least find out whether this 20 days reserved is adequate, you know, more than enough, wholly insufficient, whatever. My general sense is, this ought to be enough. If it's under by two days, fine. Let's find that out now and figure out two more days.

MR. INSELBUCH: Well, maybe the time to do that is - what is it, the 21st? All the witnesses will be identified and all the exhibits will be identified. At that point we should be able to sit down with those lists and say how long will the direct examination take with each of these

witnesses.

THE COURT: So, perhaps this is an issue in terms of dividing up the time that can be addressed on the first of the trial days.

MR. INSELBUCH: Very well. That's fine with us, Your Honor.

THE COURT: Or at the next omnibus, but I think that may be before your witness list -

MR. BERNICK: Yeah, I think that that's fine, but I think also during this period of time, particularly because you will have received the briefs again - You know, my one regret here is that we could - we might have been able to precipitate some of the these broader structural issues at some point in the past, but we were very involved in discovery. I think that the - not to argue the merits of it, but the debtors' approach is going to be very apparent in the briefs that we file in December, and I think that during the same period of time that the parties are working to figure out how long it will take to put in their direct cases, Your Honor will have the opportunity also to read the briefs and kind of get a better sense of the trial, and I think that the discussion that would be very worthwhile is a discussion at the outset of the trial about really, in a sense, okay, maybe right after the opening statements, how is the debtors' case going to proceed, and then how will the ACC, FCR's case

proceed, because at that point you will have at least gotten the briefs a major way partly - probably through I suspect a chunk of them, and we then will have more data on who it is that we're going to call. That's something I've got to sit down and do, and I know that the other side has to as well. Again, the basic problem is that the direct examination, in the same fashion that the expert reports say, Oh, well, here's going to be, you know. The direct examination is, Here it is. And the real problem is, well, when the issues get joined, how do the issues get joined, and then what is required to deal with them, and I would also urge that while our approach has not been used in the asbestos - contested asbestos estimations, which have taken place recently, it has been used in non-asbestos cases. Indeed, there is case law on our approach. So that's another place that people can go to think about how long this trial is going to last. Dalkon Shield's involved many of the same kinds of issues. The Dow Corning case involved many of the same kinds of issues. So there is learning out there, but I think that in a sense this trial is going to become long not in the direct examinations. It's going to become long when issues are joined on cross-examination and then there's rebuttal, and that is, unfortunately, the most difficult part of the trial to time estimate. It's really a question of then lawyers making judgments about how much time they want to spend pursuing

stuff on cross. I suspect the answer there too is also apparent because we've now cross-examined all of the experts. I know I've had the opportunity to do so, and I know that the other lawyers have as well. So I think more than anything else, it really is a question of becoming more concrete about the sequence of witnesses and most particularly, you know, Your Honor's sense of what it is that needs to be understood by the Court so that understanding both approaches you can then reach a decision, and I think that will have the greatest influence on how much time we want to spend covering things that Your Honor doesn't want to hear about.

THE COURT: All right, well, I think if you spend some time talking to each other about how long the direct case is going to take, that probably will - and, actually, how long the cross-examination of the particular witnesses will take because I think you probably already know which at least of the experts you're going to spend the most time focusing on, and how long you expect you're going to need for that purpose. Now, I don't know about the rebuttal. That's a little bit harder to predict, I suppose, until you see what direction the cross-exam goes, although if you've done the depositions and also affidavits with declarations, you probably have some of that in mind too, but I would think that in terms of your direct case and most of the cross-examination, you have some idea as to what an appropriate

schedule will be, and that you can, indeed, estimate how much time you think you're going to need, and then it will be my responsibility either to keep you to that schedule or to cut off the time if it's necessary or whatever. So, I think if you try to give each other some good faith estimates and we talk about it on January 14th, maybe we can come up with a schedule then. Bring your calendars. If we need to add dates, I'll take a look, but honestly dates are really going to be very difficult, and I know you're going to be into either June or July. I can't recall which, but I know May was done, tied up from my point.

MR. BERNICK: That's fine, Your Honor. I want to make just one more small comment. I had two other issues just to report on briefly to the Court. The small comment is that one of the other things that I think may be making this complicated although, as I sit here, I don't know what the solution to it is, is this: Your Honor focused a lot of time and attention last time in discussing whether the debtor was going to put the prior settlements at issue, and we went back and forth on that and zeroed in on it, and I said, No, we're not going to put it at issue. The ACC and the FCR will be covering the prior settlements, and so, really the sequence of the case will be pretty much the debtor is going to put on what it believes to be the appropriate model but is not going to address by way of anticipating a response. It's not going

to anticipate and make a response to their model. So, they will have their model that comes out in their case, and as a consequence, in a sense, their case is both a response to ours in a proposal of their case, which then means that our real response is by way of rebuttal. And that tends to, in a sense, space it out a little bit more. Maybe it shortens up our presentation a little bit at the outset, but this is not a plaintiffs/defendants and then rebuttal. It's plaintiffs/defendants/plaintiffs or however you want - whoever's hat you want to put on because there are two different theories of the case, and that, I think again, makes it a little bit more difficult, although I don't have a solution to that because I don't think that we can be put in a position of trying to put on a response to their model as part of our case. I don't think that that would make any sense. In any event, we will certainly meet and confer and try to come up with a concrete schedule and proposals for the Court on the schedule that you've indicated. There are two issues that I wanted to raise that relate to personal injury, and I think then the only other matter on the agenda, unless other people need to raise something else is, Mr. Speights is now present here, and so we can take up item 21 on the agenda, but there are two matters that I would like to raise concerning the estimation process. The first is that we did have a fairly long discussion last time about the proposed or

the possibility of lawyer testimony and then the discovery that would be associated with that, and Your Honor gave us, I think, a good deal of guidance that relates to that. We haven't really resolved that issue. There was first some discussion about whether the lawyers would sit for more than one deposition. So that we'd take their deposition to find out what they're going to say, and then we come back and have arguments about discovery and then there's the possibility of a second deposition. We've not heard from all three lawyers' counsels, but at least with respect to one, they said that they're not agreeable to that. It's got to be one deposition and frankly we think that that's the best approach. So, we come back to, I think, where Your Honor left it last time, which is that we would proceed with the subpoenas that have been issued and move to compel on those subpoenas and that that would then be the vehicle from which Your Honor can address where discovery is going to be compelled. I think that in thinking about it, probably what makes sense is to have that be a motion that is to compel the production of discovery but also then the flip side of it is to foreclose testimony regarding discovery that is not offered, that is to say, what we're really talking about are subject matter areas and the purpose for which that evidence is proffered. Really, we're talking about whether they're going to get to the issue of the debtors' intent and settlement. What we'll

do is we'll file a motion that lists the different subject matters that we think are potentially implicated by the testimony and the purpose for which that testimony is being offered, and then what we're moving to compel discovery of. We would then like the other side to respond so that these matters can be raised at the next omnibus, and Your Honor can go through and say, Okay, this discovery is allowed. This discovery is not allowed, but at the same time, if there's not going to be discovery, there's not going to be testimony. So that we have before the deposition takes place a roadmap of the area in which the testimony is going to be permitted, and we then know, also, the discovery that can be had with respect to that area. So there's no ambiguity about it. We don't have to come back with motion practice on people refusing to answer questions at depositions or refusing to offer discovery. So that would be our plan in order to get, if we can, to the end point so that we can determine whether these depositions are what they're really going to be about and what discovery is going to be offered in advance of the depositions so that we can take a meaningful dep. So, what we'd like is for Your Honor to accept a motion along those lines from us. We would file that motion probably within, I guess, a week. Let's see, we have from now until the 16th, 17th? So, that's basically three weeks. So we would take a week to file our motion, and then they can have - at Your

Honor's discretion obviously, time for a response, and we would need a reply.

MR. FINCH: Your Honor, I don't represent the lawyers. I don't know if their counsel is present either on the phone or in the courtroom. The ACC and the FCR would not be respondents to that motion as I understand it because it's a motion to compel the production of documents. So, it's in the possession of these law firms and their firm. So I'm not sure that my agreement or lack of agreement binds the debtor from filing whatever motion it wants to file, but in terms of working out a schedule I can't speak for the lawyer witnesses. So, I don't know if Ms. Ramsey's on the telephone or Mr. Rhodes for the Goldberg Persky firm.

THE COURT: Anybody on the phone representing any of the law firms?

MS. RAMSEY (TELEPHONIC): Yes, Your Honor. Natalie Ramsey representing Peter Krauss (phonetical) and representing John Clooney (phonetical).

THE COURT: Yes, ma'am. Your response?

MS. RAMSEY (TELEPHONIC): I'm having some difficulty, Your Honor, following the entire discussion. There's sort of a wind tunnel effect on the telephone. So I apologize, but I couldn't hear everything that was said, but from what I understood Mr. Bernick to say, I know that Mr. Krauss has filed objections to the document requests that

accompanied his subpoena in the Northern District of Texas. Mr. Cooney has served objections to the document requests that accompanied his subpoena which was issued out of the Northern District of Illinois in the Northern District of Illinois. Those objections were filed within the appropriate time frame. Since that time there has been no direct discussion with me concerning either the document requests or how we might proceed other than I learned by notices that were filed on the docket that the depositions did not go forward on the dates that they were proposed initially. There also was a carbon copy on an email correspondence from Mr. Finch to Mr. Bernick where I learned that there was apparently some discussion about the possibility of proceeding with two separate dates. My response to Mr. Finch was, you know, I needed to understand why that was necessary and what discussions there had been between the ACC and the debtor with respect to resolving the issues about the scope of the testimony and, therefore, whether there was guidance with respect to what documents the debtor might appropriately need. Since that time I have literally not heard anything from the debtors. So, I understand that the debtor can file whatever motion it wants. We, obviously, will respond. Part of our response, I anticipate, will be that the motion with respect to subpoenas issued out of district courts in other parts of the country where the witnesses reside, needs to be

determined in those courts, and I think we put that position on the record at the last omnibus hearing.

MR. BERNICK: Your Honor, this illustrates exactly the problem we have which is that these lawyers have appeared before this Court. They represent parties that are here before this Court. They submitted 2019 statements. If they want to insist that we litigate these matters in the jurisdiction in which they reside, I suppose they can, but it does seem to me that Your Honor certainly has the power to control the flow of evidence before the Court and particularly in light of the fact that this testimony is being proffered not by these lawyers or by their clients being proffered by the ACC and the FCR, which then brings me to the second part of our motion, and why it is that Mr. Finch's observation is not appropriate. And as he says, Well, this is just a matter that relates to the other lawyers, of course, Ms. Ramsey then says, Well, yeah, but the other lawyers are in some other jurisdiction and they got - We're not going to submit to the jurisdiction of the Bankruptcy Court, but the buck stops here in the Court with what evidence comes before the Court and whether there's been appropriate discovery with respect to that evidence. And that matter, I would think, vitally involves the interests of the ACC and the FCR. If Ms. Ramsey and her client don't want to show up and participate, that's fine with us, but then the

testimony ought to be foreclosed. So the motion that we're saying should be brought on is a motion that has two parts to it. One is to compel the testimony, and the other - to compel the discovery, and the second is if the discovery is not offered up for any reason that there then be no testimony that is permitted by that witness with respect to that subject matter because our discovery rights have not been acquitted, and whoever shows up can show up, take whatever position they want, but at the end of the day, Your Honor needs, I believe, to determine whether there should be discovery and if there's not discovery whether testimony is permissible, and if counsel for these lawyers and if the lawyers themselves want to say, We're not going to show up and we're not going to be bound, and we're going to litigate this elsewhere, I don't think it's the debtors' obligation to go to the four corners of the earth to compel the testimony when it's being - discovery, when the testimony is being proffered here by the ACC and the FCR. It is their responsibility to define that testimony, and it's their responsibility to assure that Your Honor's orders with respect to appropriate discovery are complied with, and if they can't comply with it, the testimony should not be proffered by them. It is this Court that has the ability to control the flow of evidence and the associated discovery. All we're asking for is that that be done in a timely

fashion. Whoever wants to show up can show up.

MR. FINCH: Your Honor -

MS. RAMSEY (TELEPHONIC): Your Honor, this is Ms. Ramsey again. Just to clarify. I want to make sure that I was clear before that both Mr. Clooney and Mr. Krauss had agreed to dates to be deposed, and those were anticipating appearing on those dates until they learned by notice filed with the Court that they were not going to be required. So, we have never indicated that we are not prepared to be deposed. What we have - what both Mr. Clooney and Mr. Krauss have taken issue with is the scope of the document request attached to the subpoenas which are very, very broad and ask for a tremendous amount of discovery against their respective law firms.

MR. FINCH: Your Honor, Nathan Finch for the ACC. To reiterate what Ms. Ramsey said, first of all this is a matter which strikes me as something that is - can be brought on by motion in limine not by a motion to compel and then some kind of - by asking the Court for what is in effect an advisory opinion as to how some discovery fight may play out in Texas or Illinois. We listed these lawyers as fact witnesses two years ago, two of the three of them, and the third one in September. They made themselves available for depositions in October and November. Grace unilaterally canceled those deposition. Grace put document subpoenas on

those lawyers that basically called for every piece of paper in their file that has the word "asbestos" on it. They quite properly objected to the scope of the document subpoenas. They said, We'll show up for the depositions if you - we're willing to work with you on a narrowed scope of the document requests. They've gotten radio silence from the debtor. For Mr. Bernick to come in and now say, Your Honor, we've got to do a motion to compel and have the ACC and the FCR be respondents to that motion to compel, which we're not the targets of the discovery, has got it upside down. We listed these people as witnesses. They are third party witnesses. They are not the parties in the case. The debtor had the ability to do discovery from them. It chose not to. It chose instead to serve blunderbuss document subpoenas and now it has to go and litigate those document subpoenas with the counsel. They still said they would sit for a deposition. It strikes me that asking a Court for an advisory opinion on a motion to compel as to which the Court doesn't have the documents in front of it, the documents are in Texas and Illinois, is not the proper fashion to proceed here. If, as, and when we seek to put these witnesses on the stand at trail, Mr. Bernick can file a motion in limine, and if he can demonstrate that there is some area of testimony that we elicit that has been foreclosed either by the ACC or by the witnesses refusing to answer a question in a deposition, then

Your Honor can deal with it on a motion in limine basis, but to do a motion to compel where the ACC and the FCR don't have possession of the documents and with in mind the entire process that led us to this point. They could have gotten these documents years ago, Your Honor. We've identified Mr. Krauss and Mr. Goldberg at least as fact witnesses in February of 2006. The debtor identified Mr. Beaver and Mr. Hughes and Mr. Siegel as potential fact witnesses in that same fact witness list. I spent a year either filing motions to compel or wading through lots of documents to enable me to take those people's depositions, and I went out and did so. Mr. Bernick and counsel for Grace could have done the same thing. So, I think it's a little disingenuous for them to say, Oh, the ACC and these lawyers have put up a stonewall here, which is not the case. These witnesses have offered themselves up for deposition. They have objected to blunderbuss document subpoenas. They have said we are willing to produce a reasonable category of documents. We're willing to meet and confer with you. They haven't heard anything from the debtor about what a more reasonable way to limit this. So I think the entire proposal is out of hand, frankly, Your Honor, and that the best way to deal with this and Mr. Bernick thinks these people shouldn't be allowed to testify, he files a motion in limine at the appropriate time under the schedule I think we agreed to an hour ago, it would

be seven days in advance of the Friday before these people would be called, which would probably be in March and April. That's my suggestion for how the Court should handle this, and by then, either the motions to compel will have been granted in Illinois and Texas or they would have worked it out. They will have certainly sat for their depositions and that's the proper way to proceed. Thank you, Your Honor.

THE COURT: All right. Someone else wanted to speak.

MR. BERNICK: That was, I think, somebody from Gray & Purcell (phonetical) raised - or representing Gray & Purcell asking whether we were going to raise that, and we said no.

THE COURT: Oh, asking whether you were going to raise -

MR. BERNICK: We were going to raise Gray & Purcell and the answer is no. We went through all of these things last time, and at the end of the discussion last time, Your Honor had provided us with guidance on how you were coming out on certain issues that were imbedded in the discovery matters that were before the Court. I believe Your Honor's last instruction was that we probably would have no choice but to proceed with the motions to compel on the subpoenas. So we're now down to the practicality of how to deal with that problem, and I'm not going to go revisit the two years

of trying to pry documents out of the same law firms that are now saying, Oh, they want to go ahead and testify because we went through that last time. It's down to practicalities. And the practical issue really comes down to two things that are fundamentally incompatible. We can't have these people proffered as witnesses to testify in this proceeding by the ACC and the FCR and then be faced with trying to litigate discovery issues against them in jurisdictions other than this jurisdiction because there will be a fundamental disconnect. Any court that takes up the question of compliance with subpoenas in the other jurisdictions will have not a clue on whether - to what extent the testimony that's being - what testimony will in fact be offered from these people and whether the proffering of that testimony puts the underlying work product or attorney/client privilege matters at issue. We'll go before a judge in Chicago. We'll go before a judge in California or in Texas and they'll say, Well, as far as I know these privileges apply and until they waive it, I have no reason to decide that there is going to be any kind of discovery of them at all because those judges won't know exactly what matters are in fact to be put before this Court and what arguments of waiver will then have to be taken up by this Court. Only this Court can decide that, and this Court can easily decide that without having to give an advisory opinion and without having to somehow wait for a

waste of time and waste of money process to play out in these other courts. The way the Court does that simply is to say, If the testimony is going to be offered in this courtroom, in this courtroom, it has to be offered under the rules that apply here including the discovery rules. The discovery that the debtor seeks is appropriate discovery or it's not appropriate discovery given the proffer of testimony that's going to take place and it will either be offered or not - it won't be offered, but however that comes out, there won't be testimony that goes into areas as to which there's not the opportunity for discovery. Again, Your Honor has complete control and power over the evidence. If these lawyers are coming before this Court to give testimony, these lawyers have to come before this Court to deal with discovery that is ancillary to that testimony or to delegate that to the ACC and the FCR. They can't take the position that they will both be here for trial purposes, but not be here for discovery purposes, and that Your Honor has no ability to control discovery and can't give any guidance because somehow that's an advisory opinion. That would make truly the law into a total ass, and that is just not the way the law works. Discovery goes along with trial testimony. That's the whole purpose for trial testimony. So all that we're seeking to do and if they want to make all these arguments again by way of responding to the motion, let them make the arguments. They

can go file their briefs, but we want to submit a brief that seeks to compel the discovery pursuant to Your Honor's guidance last time, and then says, in the alternative where the discovery is not offered for any reason it cannot be - those matters, those subject matters cannot be the subject of testimony at trial. Maybe that's a determination in limine, I don't really think so. I think that that's basically part and parcel of discovery and preclusion orders that take place all the time, and they can come back and respond, and whatever the response is, we will then know when Your Honor rules what the testimony - what discovery is going to be permitted and if the discovery is not permitted, what testimony will then not be offer-able at trial. We'll do it all at one time because Your Honor is, at the end of the day, in complete control of the flow of discovery and evidence in this case.

THE COURT: Well, I know I'm in control of the evidence that's going to be produced at trial. Whether I have jurisdiction over this issue or not, I don't know, but I'm sure you'll tell me in your brief, and so, you know, you're going to file what you're going to file. If what you're asking me is to allow this to happen on shortened notice so that it can be heard in December since trial's going to start in January, I guess I can do that, but I do want everything submitted to me - Well, today's what? The

26th - I guess the debtor has to file its motion if it's going to and brief by the 3rd, and the response and brief have to be filed by the 10th. If the debtor is going to do a reply, it truly has to be limited in this instance to five pages. I'm not going to have time to get through all this by the 13th.

MR. BERNICK: So it would be the 3rd for our motion. Their response is then due -

THE COURT: The 10th.

MR. BERNICK: - on the 10th, which is a Monday, and then any reply is five pages or less and is due when?

THE COURT: The 13th.

MR. BERNICK: The 13th. We can certainly make that happen. Indeed, what I - well, what I would even propose in order to give everybody a little bit more time is that we would waive the reply and maybe if we could have until the 4th to file our motion. They then get until the Tuesday, the 11th, and then Your Honor has the briefs fully by that time. If we have to take up matters in reply, we can just take them up in the context of argument. I don't think it's going to be remarkably new.

MR. FINCH: Your Honor, this is going to be happening at least as with respect to the ACC and the FCR. At the same time we're filing Daubert motions, responses for Daubert motions, and pretrial briefs. This is really a motion in limine for witnesses at trial not a discovery

issue, and it is fundamentally unfair to my client when these are individual people we're seeking to put on the stand. The document requests are directed at law firms based in Texas and Illinois, and to basically ask the Court to issue an advisory opinion on what can be testified to at trial in this type of schedule, when we're doing so much other stuff, is unfair. I think that it's a subject that should be subject to a motion in limine when, as, and if we identified them as people we will call in such a block of time and not dealt with on a hurry up and rush basis on a discovery issue in the same time we're briefing five other things, and so I think it is a problem the debtor has created for itself. It doesn't have to be resolved in the next 10 days. It's something they could have resolved long ago and to then cram it into the same time period that Mr. Mulledy and I are going to be writing briefs on Daubert, trial briefs, response to their Daubert briefs is just simply unfair.

MR. BERNICK: Your Honor, we went through all of these timing issues before. The pretrial schedule for this case was specifically -

THE COURT: You need to use the microphone.

MR. BERNICK: - specifically created the opportunity to take the depositions of further people who need to be deposed who hadn't been deposed and who were on fact witness lists. So this is nothing that was new. We

always anticipated this was going to happen. The same argument that said, Oh, well, gee, we waited till the last minute, we responded to completely last time, and the outcome of the discussion last time after the better part of an hour and a half of discussion was that we would proceed by way of motion practice. All that we have done is to now make a concrete proposal for getting that motion practice done. The issue is not overwhelmingly complicated. We have to get this thing resolved, otherwise the net result is that they will be putting on people as to whom we have not had the opportunity of discovery, and that was completely contrary to exactly the deal that was made in connection with the pretrial schedule that provided that we would have that opportunity. Your Honor also gave us relief from the October 31 deadline for purposes of taking this discovery, and this was last time. So, the whole idea that all of a sudden we're now rearguing whether we should have the opportunity to conduct this process at all, Your Honor resolved this last time. All we're doing is being concrete about it.

THE COURT: I am not entirely clear at this point whether this is coming up as a discovery sanction or as a motion in limine. I think in some senses it's the flip side of the same point.

MR. BERNICK: It is.

THE COURT: It's a little difficult to see without a

motion. You know, I think the debtor has the opportunity to raise this. You've got the opportunity to rebut it and to suggest that it should come up in another fashion. It seems to me that if you're going to produce a witness then in fact if the requested discovery is relevant, the debtor needs an opportunity to do discovery. I understand that the witnesses were identified a long time ago, and that may be to the debtors' peril. I don't know. I need to see it in the context of the appropriate motions and briefs. I've already indicated, I don't know - With respect to the production of document issue, I don't think that issue is before me at all. That's before another court where the motions are pending not before me.

MR. BERNICK: Well, the request is for - the request for relief that's pending before you, Your Honor, is what kind of discovery is appropriate if they are going to be permitted to testify in certain areas, and if the discovery then is not offered, that the testimony is not offered, and that cannot be put before any judge at any remote jurisdiction because they don't know anything about this case and what this case is focused on. They can't determine whether privileged matters have been put at issue or not because they have no connection to this case, and that is not a situation of Grace's creation. That is a situation of the creation of the claimants and their counsel. This is just a

very - at the end of the day, it's pretty simple. Are these people going to be permitted to testify about something as to which we don't get discovery? That is the matter that we're going to be putting before Your Honor, and if they want to argue that somehow we should - in a sense, we should be the ones who now at this point in time don't get discovery because they fought tooth and nail against all discovery of lawyers for two years and lead us down the path for my making a representation on the telephone at their suggestion that I would not seek any further discovery of the law firms, only then to turn around, and then identify these lawyers as people that they were actually going to call at trial and testify about exactly the same matters as to which they had resisted discovery for two years, let them make that argument. Let them make the argument again because at the end of the day, this is all a question about whether they get to call people live to the stand in this courtroom and simultaneously to say, Well, we've got to go litigate privilege in the four corners of the earth. Your Honor can't even consider that but they still get to testify. It's they still get to testify that I want to raise before the Court. If they want to take a position that for whatever reason they're going to insist upon privilege and they're not going to produce documents, they can tell the Court that, and then Your Honor can decide whether there's going to be testimony

or not.

THE COURT: My major concern at the moment, Mr. Bernick is the allegation that there has been some effort by the law firms to try to get in touch with the debtor to resolve the discovery issue and there's been no response to that.

MR. BERNICK: That is - That's not right. What happened was, at the end of the last hearing, the burden was put back on the debtor and the ACC and FCR to figure out, well what are these people going to say to see if we could resolve this. So obviously rather than having - it's pointless for me to talk with Natalie Ramsey or anybody else to try to resolve the scope of their testimony because they don't control the scope of the testimony of these people. All they're doing is protecting the privileges that they believe apply to the law firm files. So, the cart here, the cart is - or the horse here is what are these people actually going to say at trial and what discovery is necessary in order that that trial testimony be offered up? The cart is, Well, what happens to the privilege? Now, we can't resolve the privilege issues in Texas, Illinois. We can't resolve them with Ms. Ramsey or with counsel for Goldberg, Persky until we figure out what is it that these people are actually going to say when they come here to testify. That is an issue for the ACC and the FCR. So we reached out to them to

try to see - I did have conversations with Mr. Finch and Mr. Mulledy. In fact we had lunch, a very product lunch, talked about the pretrial order and I raised precisely this issue saying, We've got to sit down and see if we can't resolve it. It didn't get anywhere. It didn't get anywhere. So there's no point in calling up counsel for these individual witnesses. I've got nothing to say because I don't yet have a solution to the horse, which is, What's the testimony going to be? So, my proposal for doing this motion is, again, to put out, you know, the list of, here are the subject matters. We then move. They can respond. I don't even know that we need counsel for the individuals here because maybe we don't even need to resolve privilege issues. What we need to resolve is, if they're going to testify about these given subject matters, are we entitled to discovery or not, and if we're not going to get the discovery, are we going to hear them testify about those subject matter areas? That's a matter squarely within Your Honor's control in deciding, Are we going to have testimony in areas where there is not going to be discovery? That I believe is the issue that we'll tee up before Your Honor because that's the one that we're focused on. We have - Oh, we have another lawyer for the agency. Go ahead.

MR. INSELBUCH: Thank you. First of all, there's no emergency here. He's making an emergency. These witnesses

can't possibly be reached for testimony until sometime in March if not later. So there's no need to resolve these issues today. Second of all, we have followed the Federal Rules of Civil Procedure in this case, just as we do in every other case. When you have a witness that's not subject to the jurisdiction of the Court, you get a subpoena served on them where they can be subject to the jurisdiction of the Court. That's what Mr. Bernick did. Those witnesses have said they would testify at deposition. He served a document notice. They've objected to it. He hasn't done anything more about it. There are procedures that deal with what you do when a witness objects to document production. He's chosen not to do that. He could still choose to do that. He could proceed and see what documents he gets. He's going to get a list of the witnesses who are being called on to testify and a small synopsis of what their evidence is going to be in accordance with Your Honor's order. He's going to have some idea at that point. For sure, he cannot be required to sit there while a witness testifies on subjects where he was precluded from discovery. Nobody is arguing with that view, but that doesn't change the rules and the jurisdictions of the various courts to apply the rules, the Federal Rules of Civil Procedure here. They have not been repealed. I would suggest to Mr. Bernick that when he figures out what he wants to do, if he wants to proceed to

get his documents, he can go and see what the judges say about that. If the judges say he can't have those documents, and if those witnesses proceed in your Court to offer evidence from those very same documents that he was precluded from seeing in the discovery phase, for sure Your Honor won't permit that to happen. But he is not entitled to have you address this in some kind of vacuum where you have no jurisdiction over the deposition documents themselves, and worse yet to do it now on an emergency basis when everybody else is doing something else. I would submit to Your Honor that he should go ahead, finish his business on discovery, get whatever documents he thinks he wants, take his deposition, see whether his questions are objected to at the deposition, and then he'll be ready at trial to deal with whatever evidence is presented before Your Honor, and that won't be until March if not April or May.

MR. BERNICK: That's an invitation, Your Honor, to have this whole matter continued to play out during the course of trial. The procedures that we have had, indeed at the insistence of the ACC and the FCR, was not to have that take place. There was active opposition to that having taken place, and there is now an opportunity to get this matter resolved. The only reason that it's taking time is the same people who are voluntarily going to come into this courtroom and testify are saying that they're not going to volunteer to

have matters about discovery that are directly tied to their testimony resolved in this Court. You cannot do it both ways. You can't show up, testify live at trial, then say, Oh, by the way, you don't have jurisdiction over me. That is novel. That's not only novel, it's not what the rules contemplate. The witness is here. Your Honor would have the power if we had a witness testifying right now to say, Go get me the documents.

THE COURT: Yes, I would, and maybe I'll do that.

MR. BERNICK: But there's no reason - the only reason that they want to have this postponed is then to argue later on, Well, he's had the opportunity to take the discovery. It's not a big deal. Let's let the evidence come in however it will. We don't want to go down that road, and we certainly don't believe it's appropriate for us to have to go litigate issues of privilege in the four corners of the world outside of this Bankruptcy Court before judges that will not have the ability to resolve those issues because they don't know what it is these people are going to say at trial.

THE COURT: But I mean that happens in any court in which a subpoena is issued if there's a document request that's objected to and the subpoena is contested in the court in which the subpoena was issued. That always happens.

MR. BERNICK: That is true. Typically if you have a

witness that's outside the jurisdiction of the Court and there's then discovery, they have the privilege of appearing before a local court to contest that discovery. There's no question about that. This case is different for two reasons. It's different, first of all, because those people have been here and they've participated. They've entered appearances, and they have filed 2019 statements. I believe that we can get - In fact, we've gotten discover repeatedly over precisely this objection of matters that we didn't go out to the law firms and subpoena the law firms, but we had all kinds of discovery and the connection with those matters they were content to have Your Honor resolve privilege issues, including the consultancy privilege which they had Your Honor resolve, and after all that process was all over, they tell us, Oh, well, gee, we'd like to have those matters resolved in the four corners of the earth. It's different from that reason, and it's then different for an even more important and more fundamental reason. These are not third party witnesses who are outside the jurisdiction of the Court. They're going to be showing up here, and that is completely different. If you get -

THE COURT: No, I think we're talking apples and oranges. I think the difference is this: In the instance where the lawyers filed the 2019 statements, they were filing them as counsel of record for the claimants in the case, and

the documents that were subpoenaed were the claimants' records in the custody of the lawyers. So, yes, they were before the jurisdiction of the Court because they were officers of the Court representing the clients who were subject to the jurisdiction of this Court, but that's a different issue from what happens now. Now, you were looking at those lawyers as witnesses here, not in their capacity as attorneys who are officers of this Court but as actual fact witnesses in their own behalf, which is why the subpoenas had to be issued in another court, not this one. So I'm not at all convinced that this Court has the jurisdiction to adjudicate the document objections that are attached to a subpoena issued by another court. I don't think I do, Mr. Bernick.

MR. BERNICK: Well, Your Honor, I would say two things: One, I don't think that the - I don't think that that line is quite so clear. Yes, the claimants with respect to whom they were counsel of record were claimants who still have pending claims. They're not settled claims. Whereas, I believe that the testimony that they'll offer relates to claims that were settled, and there is that distinction there. The closed claims clients have not come before the Court. I believe, however, that the testimony that they're going to offer is testimony that says, because correspondence indicates this, that the reason that their current claims

didn't have the information that they should have had in connection with the questionnaires was that that information had never been required with respect to prior claims, and therefore, was not turned over with respect to the current claims. So that they're going to blur that line. They're going to offer up the past settlement practice by way of now finally explaining with respect to clients that they do represent in this Court why it is they haven't submitted the information. So, they are testifying as fact witnesses on behalf of essentially the evidence that's being offered from current claimants. So when they show up here, they're showing up here not only with the hat of being counsel for prior claimants, they're showing up here with the hat of being counsel for current claimants and trying to exculpate or offer some responses to why the information has not been provided. That's point one. Point two, we can't get beyond the notion that their showing up in this Court to offer testimony. If they were going to have offered testimony through deposition before as third parties outside the jurisdiction of this Court, we would have come back to Your Honor, basically with the same issue during the course of the discovery process, and you would have had to reach the same issue which is, Do I now allow in the deposition testimony of this person who's outside the jurisdiction of the Court given the fact that they've objected on privilege grounds on X, Y,

Z. This is no different from that, but it's stronger because they are now actually showing up. They're going to - They're not going to -

THE COURT: But you can take the deposition and the deposition testimony would be just as good. I mean the rules provide for the allowance of -

MR. BERNICK: That is true, but they're not doing that. They're going to be here. They are -

THE COURT: Maybe they're going to be here.

MR. BERNICK: Well, they are - Well, that's certainly the representation that's been made.

THE COURT: Well, we'll see.

MR. BERNICK: And the discovery has been cut off with respect to all other testimony. So they're going to be here as live witnesses. So the issue of law before Your Honor is, Do you have jurisdiction to define the conditions under which their live testimony will be offered, or do you have to defer to how those matters get resolved by a judge who is a stranger to this proceeding, will not preside over the taking of that evidence in some far-flung court, and the answer to that, I think, is just totally plain. They are volunteers here. They are not simply people who are appearing under compulsion. They are volunteers. There is no subpoena that's going to put them on the stand.

THE COURT: All right.

MR. BERNICK: So if they are volunteers and they are appearing voluntarily on the stand, that clearly the rules that would apply to them is - if they were not before the Court, are different. If they're not before the Court, we'd have to proceed by way of subpoena that issues out of a local court. They're before the Court. Your Honor has complete power to make determinations about what you will and will not accept by way of testimony depending upon where there's been discovery. All we want to do is that we want to front-end load this so that Your Honor makes clear what it is that's going to be acceptable or not. Mr. Inselbuch says, Well, clearly, if somebody gets on the stand and there hasn't been discovery, Well, gee, that shouldn't be allowed. Well, if that principle is not controversial, it shouldn't be very difficult to work through the list of the different subject matters as to which we believe that they are potentially going to testify and determine, Well, which ones of them are properly amenable to discovery if they're going to testify live, and then it's up to them to decide whether they want to oppose it in whatever jurisdiction they're in.

THE COURT: Well, I think it may be easier in this case to keep discovery on that issue open and to require that in the witness list designation if these lawyers are called or to be called as witnesses, that the specific areas of their testimony be identified. And that way, rather than

just general they're a fact witness on the concept of settlements, that it has to be articulated in a better fashion. In fact, I think by way of declaration. And then you'll know what the proposed areas are, and then you can determine whether or not there will need to be some discovery if you choose to object to the testimony or what, and I think in that context a motion in limine may work, but in all instances, you'll know whether you want to take discover or not, and I will simply keep discovery open for that purpose.

MR. BERNICK: Okay, that's fine with us, Your Honor. That way we will have that on the 21st, but I still then will want to get the matter teed up fairly promptly with the Court so we then can proceed, and we would then, I think probably take that up. Do we have a pretrial conference at any time before - This is it.

THE COURT: I think what we'll do, I believe, is put this issue on - When's the January omnibus hearing? Let's put this on the January omnibus, not on the trial date, but just on the January omnibus because by then we will have - the trial will have started. You will have had the witness designations. You'll know whether the witnesses are potentially going to be called. You'll have the specific areas in fact declarations. I want them by declaration for these witnesses.

MR. BERNICK: Okay, that's fine, and then we can put

it on for the January omnibus. The one - the other one witness, and I do have - I can hardly - There's a lot -

MR. INSELBUCH: I don't understand, Your Honor, about a declaration.

MR. BERNICK: Well, why don't -

THE COURT: What I am suggesting at this point -

MR. BERNICK: Go ahead, go ahead.

THE COURT: What I'm saying is, for these particular witnesses, the lawyers that the ACC or FCR may choose to call who have been subject of the subpoenas and who have not yet been deposed and who have not yet responded to the document production requests attached to the subpoenas, that to the extent that they're going to be identified as witnesses, rather than just a general subject matter line that says they're going to be called to articulate issues about the settlements, that their statement as to what they are going to be called to do should be by way of declaration from the witness.

MR. INSELBUCH: They can't do that, Your Honor.

THE COURT: Why not?

MR. INSELBUCH: Because we control them as witnesses.

THE COURT: Yes.

MR. INSELBUCH: They are not - They are third-party witnesses.

THE COURT: Yes.

MR. INSELBUCH: And first of all, he could take his discovery. He keeps saying the discovery's been blocked. It's never been blocked. He never chose to take his depositions.

THE COURT: Well, he could take the depositions, that's true.

MR. INSELBUCH: He can take any deposition he wanted.

THE COURT: That's true.

MR. INSELBUCH: He could have taken them for months. He had them - He had agreed dates on two occasions to take the depositions.

THE COURT: That's true.

MR. INSELBUCH: He didn't do it.

THE COURT: That is true.

MR. BERNICK: Your Honor, that is -

MR. INSELBUCH: That is absolutely true.

THE COURT: Pardon me, gentlemen -

MR. INSELBUCH: I'm sorry, Your Honor.

THE COURT: You will not - neither of you will do this any longer, please.

MR. INSELBUCH: I beg your pardon, Your Honor.

THE COURT: You could take the depositions, Mr. Bernick, why haven't you taken the depositions?

MR. BERNICK: Excuse me. For all the reasons that we went over the last time when Mr. Inselbuch wasn't here, which is that there's no point in taking a deposition where the witness has not produced any documents -

THE COURT: Well, sure there is. You can ask what the documents are and whether they exist and if the witness says, Yes, I have them but I'm not going to produce them because of whatever, attorney/client privilege, you'll know that there are in fact documents.

MR. BERNICK: Sure, we could always do that and then have a discovery process for documents afterwards and then a new deposition.

THE COURT: Right.

MR. BERNICK: We made the decision that there was no point in doing that, that the first thing that had to be resolved was what were they going to say and what documents would be implicated so that we could get it resolved, and history has shown how well taken that was because now their answer is, they don't even want to have Your Honor resolve them, they want to have judges all over the country resolve them.

THE COURT: Well, they're entitled to that. That's where the subpoena came from.

MR. BERNICK: That may well be, that may well be, but the reason that they were not deposed during the period

of time when at least two of them were listed was very simple, which is that while they had been listed before, every day, every week we were here arguing again and again and again about whether we would get any discovery into how the lawyers actually ran the litigation. How they settled cases, the information that was gathered, and we were shut down every step of the way.

THE COURT: Okay, but we're beyond that, and I'm trying simply at this point to figure out what it is that the debtor is going to need, and I'm going - I am simply trying to work out a process. And you're correct, Mr. Inselbuch, the debtor could take the deposition. I'm also correct that you could attach by way of some information as to what the witnesses are going to be called to testify a declaration as to what they will be called to testify. If you want to do the declaration saying if called this witness will be called to testify about the following, that's fine.

MR. INSELBUCH: We are prepared to give Mr. Bernick and the Court a fair summary of what the testimony will be, what we will ask the witnesses to testify.

THE COURT: That's fine.

MR. BERNICK: But it has to be a - Mr. Inselbuch has said, and it's true, that they control - those were his words. They control these witnesses -

THE COURT: Of course -

MR. BERNICK: Excuse me, they control these witnesses. They are getting the witnesses to show up for whatever reason they're showing up but it's at their request without compulsion and that number two, they will then define what it is they're going to have to say.

THE COURT: Of course.

MR. BERNICK: So it's fine with me if we get the declaration about what the witness is going to say, and Mr. Inselbuch has a hand in it, but it has to come from the witness about what the witness is going to say -

THE COURT: No, it does not. You can take the deposition after Mr. Inselbuch provides the summary if you choose to do that. I think that's correct. It's a witness summary. It can be a summary of what the witness is, but Mr. Inselbuch, I don't want it to be, you know, three words. It's about the settlement.

MR. BERNICK: Well, I -

MR. INSELBUCH: Excuse me, excuse me.

MR. BERNICK: Your Honor, this is - I've never had someone physically push me away from the podium.

THE COURT: Mr. Inselbuch, you will not do that. Gentlemen, move. Both of you move.

MR. INSELBUCH: Because he won't move.

THE COURT: Both of you move.

MR. INSELBUCH: I can speak from here, Your Honor.

THE COURT: Gentlemen. I really do not appreciate this type of behavior.

MR. INSELBUCH: I don't blame you, Your Honor.

THE COURT: It's like - Well, then, please don't do it any longer.

MR. INSELBUCH: Yes, Your Honor, I was just -

THE COURT: Apologize to Mr. Bernick.

MR. INSELBUCH: Mr. Bernick, I'm very sorry.

THE COURT: All right, now, Mr. Inselbuch.

MR. INSELBUCH: Thank you. You can be assured that I will take the Court's instructions to heart. I understand the sense of what you're telling me. I understand the words as well.

THE COURT: All right.

MR. INSELBUCH: And you can be assured that I will honor them.

THE COURT: All right, thank you. Okay, so that the record is clear, I am keeping discovery open as to these three witnesses. It is not closing. We will put this issue back on the January omnibus so that you have the witness designations with a particularized understanding of what the witnesses will be called to testify about if they're called at all, which I don't know at this point that they will be listed, but if they are, it will be itemized in some fashion or other that will be meaningful. Then, Mr. Bernick, if you

think you need discovery we'll address further issues at that time. With respect to the documents though, I think Mr. Inselbuch's correct. If you're going to have a document fight, I think you're going to have to do that in the court in which the documents subpoena was issued.

MR. BERNICK: I think really that may be true. Again, I think when they show up on the stand, it's all over, they're here before the Court, but frankly, once we have Your Honor's determination about what's going to happen with respect to their ability to testify about matters where there's no discovery, the burden is then, it seems to me, on the lawyers and their clients to decide, Well, do they want to offer up that discovery or not? I'm not inclined at that point to go around and then present that piece of paper to a bunch of judges all over the country who really aren't going to know anything about the case and have it resolved by them in the abstract. The burden is then on them to offer up the discovery that's ancillary to their witnesses' voluntary testimony.

THE COURT: Well, we'll address that in January and see what happens. In all probability, if they're going to try to testify about documents and you want the documents, you're probably going to get them or else they're not going to testify about documents. Whether they're going to be testifying about documents or not is something at this point

I just don't know.

MR. BERNICK: Well, I think they're going to testify about facts and the facts are going to be very general and they're going to go - you know, it's all the stuff we talked about last time, and the real issue is whether we get full and complete discovery with respect to those, and I think when we get down to the details of how broad their testimony is going to be, I think we're going to be back to where we were at the last hearing, which is a fundamental decision that's got to be made about whether they really want to place at issue what is it that they thought was the meeting of the minds about settlement because that is, at the end of the day, what they're doing. Is here were the criteria that were used. Everybody was happy that that represented a liability. Grace was happy, that was Grace's intent. That was our intent, and they want to be able to say that without being cross-examined on any particular file, on any particular matter, on any particular document. It's the same discussion, exactly the same discussion that we had the last time.

THE COURT: Well, they're going to have some difficulty testifying as to what was in Grace's mind; aren't they? Just like Grace is going to have difficulty testifying about what is in somebody else's mind.

MR. BERNICK: I agree, but that's the only real

purpose for which it could be proffered, but these are all things that we can take up in due course. The last issue that relates to this and then there was one more unrelated issue, is the deposition of Mr. Snyder. Mr. Snyder is an expert witness. His deposition was not taken because - for two reasons really. One, is that there was not agreement with respect to discovery of his underlying files, and number two, his wife unexpectedly passed away. So we deferred the deposition. The issue with respect to Mr. Snyder is, can he testify as a fact witness as well as an expert witness without being amenable to discovery of the materials that he was dealing with as a fact witness? He represented Owens Corning for many years. He wants to tell the story as an expert of why Owens Corning ultimately didn't have any choice but to settle because their liability would have been even greater if they had decided to litigate. That testimony as an expert we've got a lot of problems with for a variety of reasons, but it's not a question of whether we get discovery of his files for that purpose. It's when he's proffered as fact witness that once again we've got a problem. He talks about the history of his representation of Owens Corning, down so some fairly specific details. As a fact witness, he wants to offer them into evidence. We think that they have only tangential relevance because none of the other side's experts, either the ACC's experts or the FCR's experts,

actually relies upon the history of Owens Corning settlements for most of the period of time that Mr. Snyder was representing them. So I'm not sure why it ties into their models, but they want to offer it up. If they're offering him as a fact witness, we should get discovery of him as a fact witness. I believe that the right answer, probably is, they don't need him as a fact witness. They can have him testify as an expert in which case the underlying facts don't themselves come into evidence, but they may support whatever opinion he has. We tried again to press the issue during the interim period of time since the last hearing. We were not able to reach resolution so he is yet another situation. Now, he is an expert witness. So, we have to take his deposition under any set of circumstances, and we would like to. We can schedule that, but if we are then going to be faced with his testifying as a fact witness as well, I think what I would probably propose today is that we handle him in the same way as we just did for the other lawyers when it comes to his capacity as a fact witness. Is if they want to schedule him, list him as being a fact witness as well as an expert, they should supply us with the same witness statement at the same time -

MR. INSELBUCH: Okay.

MR. BERNICK: Good. But then we've got to have - we're going to have two depositions of Mr. Snyder.

MR. INSELBUCH: No.

MR. BERNICK: Well, then, I guess Mr. Inselbuch says, No. We're entitled to take his deposition as an expert without waiting for this process to unfold of taking his deposition as a fact witness.

MR. INSELBUCH: Okay.

MR. BERNICK: What?

MR. INSELBUCH: Okay.

MR. BERNICK: Good. Last issue of the day, I think we've resolved -

THE COURT: Just a minute.

MR. BERNICK: Okay.

THE COURT: All right, so discovery is not closed then as to Mr. Snyder with respect to his being called as a fact witness, and this also will be addressed at the January omnibus with respect to his testimony as a fact witness. I assume you're going to work out the deposition with respect to his expert testimony.

MR. BERNICK: Yes, because that's just been really a question of his personal situation. The last -

THE COURT: Right.

MR. BERNICK: - issue that I have before we get to Mr. Speights relates to the plan of reorganization, the proposed plan of reorganization that was just filed by the ACC and the FCR. I know that Your Honor is probably aware of

that and aware of the basic dimensions of that, although I don't know if you've had the opportunity to study it.

THE COURT: No, I haven't.

MR. BERNICK: And all that I would say is I don't know - I don't know and I don't want to anticipate today how it is that that plan will be used, if at all, in connection with the estimation process, but enough said that Your Honor should also know about something else which is that you terminated exclusivity - obviously, they asked for that termination in order to file that plan, which they did, that is not a surprise, but I think you probably also hoped and expected that there would be some settlement-related activity as well. All that I can report is that the debtor after termination of exclusivity sought to initiate a new run of talks, made a specific proposal to the other side, and that perhaps coincident with their development of their plan, the only response to our proposal was a major step in the opposite direction, that is, they've pulled back on their position in a fairly dramatic way and the parties are now further apart then they were before the termination of exclusivity. We're still hopeful that that situation will change, but at this point in time, all that we have of their settlement position essentially is what it is that's reflected in the new plan that they have proposed.

THE COURT: All right. Mr. Finch?

MR. FINCH: Yes, this is a housekeeping matter. Your Honor, we will submit a revised and amended case management order containing all the dates and briefing schedules and stuff probably on Wednesday.

THE COURT: All right.

MR. BERNICK: I think that that's all that we had on personal injury, and I don't know if there's anything else that you all wanted to raise. Are you okay? Okay, and then I think the last matter was Mr. Speights' matter that relates to three claims that has been the subject to a lot of briefing, but rather than getting into it myself, Mr. Speights wants to take that matter up.

MR. FINCH: Your Honor, may I be excused?

THE COURT: Anybody who wants to leave may, but you act at your peril, as I've said before.

MR. FINCH: Thank you, Your Honor.

THE COURT: This is item 21, I think - have I lost - Good afternoon, Mr. Speights.

MR. SPEIGHTS: Good afternoon, Your Honor. Dan Speights representing certain PD claimants with respect to item 21. Your Honor, after listening the last three hours of the PI debate I must confess I want to quote George Gobel, I feel like a pair of brown shoes with a black tuxedo in getting up here and arguing about whether three pieces of paper were signed on March 31, 2003. Your Honor, this is a

status conference. We're not here to argue the merits, we've argued the merits several times and Your Honor issued an order and then an amended order, and we're at a status conference to decide where we go from here. And, as I see the situation, there is one issue. I believe Mr. Bernick believes there are two issues. I believe he would agree with me that one issue is whether these three claimants signed an authorization before March 31, 2003. It's as simple as that. It's a simple factual issue. I'm not sure whether the debtors challenge that or not as to one, two, or three, but it seems to me in this complex case that if there's anything that could be decided in a few minutes, it should be that issue. The question is, how do you decide it if the debtors won't finally concede it now. The first way to decide it at least would be to have a meet and confer. Last Monday morning, at 10:35 a.m., I sent an email to Mr. Bernick and Ms. Baer and another lawyer in their firm and suggested that we have a meet and confer, and I told them when I was available last week, and I did not hear a response. I know it was Thanksgiving week, and I know everybody's busy, and I don't want to start any unpleasantness, but I'm still available to have a meet and confer. I might say while I was on the late plane coming into Philadelphia this morning, I got a message from someone at Kirkland & Ellis suggesting Mr. Bernick was available for a telephone call at noon, and I was

in the air at noon, but perhaps we should just sit down in a room together and say what is it about these pieces of paper that make you suspicious? Do you think Dan Speights has some printing press in Hampton, South Carolina kicking out false authorizations? I have shared the pieces of paper with the Court and Mr. Bernick that show, I think, conclusively that we had authority before March 31. So I'm happy to do it by meet and confer, but if they're never going to concede, I'm happy to do it before a neutral. I'm happy to do it at trial. Set it down for a trial, an evidentiary hearing, or whatever the Court decides. I'm even, and I know, and I understand Mr. Bernick's very busy, and this is a rather insignificant matter under the greater context of all the hundred thousand personal injury claims. I'm happy to sit down with his client, Mr. Fink, the corporate counsel is familiar with this and see if he and I can't agree on that issue. I'm happy to sit down with Mr. Restivo. We've had great luck in sitting down and saying, Do you or do you not agree that these authorizations were executed prior to March 31? And that to me is the only issue. Now, Mr. Bernick has a second issue which he raises, and I think it's in the amended order, and that is, even if the authorities were executed before March 31 were they timely disclosed to the debtor? Fine, set it down for a hearing, and we will argue that issue. We briefed it. I'm pretty confident about what

happened. Your Honor's addressed it in an order, and I'm happy to come to Pittsburgh - I'm willing to come to Pittsburgh, I'll say, in December or in January or whatever and we'll argue that second issue, but we don't even need to get to the second issue until at least we resolve the first issue. Were these authorities executed before March 31, 2003? So, I guess at a status conference all I'm looking at is a process to finally resolve this matter and again, any of those alternatives are suitable to me. Thank you, Your Honor.

THE COURT: Mr. Bernick.

MR. BERNICK: Your Honor, we did think about, indeed, thought a lot about if there's a way to get this matter resolved without being litigated. I did reach out to Mr. Speights perhaps a little too late because of the travel schedules and the like, but my message was not going to be any different from what it is that I'll tell Your Honor which is that we just don't see how to do it. There's a very specific issue that drives whether the claims are going to go forward at all. The matter has been briefed extensively. We did make a proposal earlier on to Mr. Speights about how to resolve the three, but he raised a very good concern with it that I won't go into in detail, but we agreed with him that we really couldn't discuss our approach on a basis that would be appropriate from the point of view of how he's

representing his clients. Basically, you have one client being treated one way and another client being treated another way, which is what we thought was the right way to go, but he said he can't do that, and we agreed with him, he couldn't do that. So, we really come down to this issue. This issue is the driving issue and the context of which it takes place is not simply well, we're at the beginning. Remember that we've now been through this issue ad nauseam in terms of gratification and the like, and Your Honor decided that to reopen or to open up the question as to whether a prior order issued by the Court should have included these three claims or not. So, it is not as if this is being approached with a clean slate. The real question is as Mr. Speights demonstrated that there is a reason why these claims should be treated differently from the other 68 claims that were expunged as being late claims, and the threshold issue there is not whether there is in fact evidence that there was authority before the bar date. The issue, first issue is whether your prior order was complied with and if it wasn't complied with whether the prior order in a sense was revoked or altered in some fashion during this hearing that took place in January. To be more concrete, we know that there was a September 23, 2005 order that said, if you've got authorizations, written authorizations, give us a list of the client claims with respect to which you have the written

authorizations, the documentation, and that order applied, and they submitted certain information by that order, and the information they submitted in time for that order didn't in fact establish that they had authority prior to the bar date, which is the key issue. So, at the last hearing Your Honor issued as part of your order the requirement that the briefing that would be filed before the Court would not only provide any documentation that Mr. Speights thought appropriate, but would specifically address the question of whether relief was granted from that September 23 order and the subsequent hearing that took place in January where Mr. Speights proposed to argue ratification first. And the fact of the matter is, the record as it stand now, shows that he did choose to argue ratification first at that hearing. Your Honor allowed him to do that, but there's nothing that happened at that hearing or at any other time that modified, suspended, or otherwise affected the terms of the September 23 order, that would require that he had to submit that information and that list by September 23. There's nothing that happened subsequently that gave any relief from that order. So, that order would apply by its terms and that is the end of the story because the authorization information that was provided by the time of that order did not establish that the authorization was pre-bar date. So their latest brief now creates or purports to create a whole new issue,

which is, Well, did that September 23 order require that we submit authorizations that predated the bar date? That is, he now says, Well, we weren't really required to submit any particular authorizations but just an authorization or some authorization. So we didn't really care to submit information about pre-bar date authorizations, and moreover, it's unfair - it's unfair to require that that order be read otherwise because we didn't really know at that time whether it made a difference whether the authorizations were pre- or post-bar date. And he says, Gee, the whole question of timing arose subsequently. So this is now a whole attack not on the question of whether they were given relief from the September 23 order, but whether the September 23 order by its terms required that they submit the authorization that they had pre-bar date. So it's now a whole new argument, and obviously he now wants yet another hearing because we have lots and lots of hearings when it comes to these PD claims that Mr. Speights has. The observation that I would make is that there is a relatively simple answer to the question of whether the September 23 order - We now know it was never revoked, never suspended, there was never relief given from it. We're now done with that theory. We're now on a theory that says, Should it be interpreted to require that Mr. Speights offer up evidence of authorization pre-bar date? Or is it really true, as he says, that nobody really was raising

the issue of when the authorization was provided? And we would just draw Your Honor's attention to Exhibit S to the brief that we filed because it turns out that what was going on at the time that all this was taking place is that we had raised the issue of authorization generally, and we couldn't even figure out what the record was for authorization. So, we were saying, We object. They don't have authorizations, their obligations is to supply them, and we couldn't even get the record fixed on what the authorizations were. That's why the September 23 order was issued, was to say - and it was issued on the same date with a deadline on the same date as the order was issued. That is, it's closing today. That was the essence of that order. Well, is it really true that there wasn't any question that had been raised about timeliness of authorization? That's just not - there's not - that's not accurate. Mr. Speights filed a statement of facts relating to its authorization to file certain claims in this Chapter 11, and he did that on July the 13th of 2005. So he did it months before the September date, and this document's particularly important, and we refer to it in our thirteenth objection - our thirteenth objection which is docket 9311 that was filed, that's the omnibus objection on authority, and it was filed on September 1. So it's a month before the September 23 order. This specifically says in paragraph (30) on page 14: Speights has also signed a statement of facts

confirming Speights had no oral or written authority from these clients before filing claims in March 2003. See Exhibit S. So it's Exhibit S to docket 9311, and this Exhibit S dated months before July 13, systematically goes through a whole series of claims and specifically differentiates whether there was authority before the bar date or after the bar date. So, with respect to the first one, Northwest Community Hospital, Speights & Runyon received no oral or written authority from these two claimants either before filing these claims in Chapter 11 or since. Paragraph (D) is Fort Wayne Chamber of Commerce, separately stated, Speights & Runyon had oral authority from this claimant before filing this claim in the Chapter 11. And then (4) says, Speights & Runyon states it now has obtained - It has now obtained written authority from its claimant and will provide this evidence. Paragraph ©) deals with yet another claim. Buyers Machine Company separately states that no communication with this client before filing the claim and paragraph (6) says, Believed it had authority to file this claim based upon Anderson Memorial. So the whole question of timing, when was the authority given, was it given before the claim was filed, after the claim was filed, was in his own document because this is exactly the issue that we were raising with him at the time. So he knew in July that when the authorization was given was important. He made the

differentiation himself. We pointed this out in the thirteenth omnibus objection filed in September. The record was closed on September the 23rd, that record had to reflect whether there was authority before or after the bar date, and with respect to these three claims, again, we now know that the material that was provided in a timely fashion, given that deadline, did not reflect whether or not the authorizations had been given before or after the bar date. You simply can't determine it. So, the threshold issue is, has been common in these case is, are people going to comply with Your Honor's order? Here we had a plain order. The purpose was to fix the record. The record is fixed, and the motions that Mr. Speights has made which really give rise to all of this to now amend the record or supplement it, those motions are not well-taken, and the order expunging these three claims as part of the group of 71 should stand. We don't really think that it's necessary to have another hearing on this. The matter's been fully submitted to Your Honor. We supplied for the record here a particularly important citation given the last brief that he submitted. If Your Honor wants us to file another brief that lays that out, we can, but we think that we now have a complete record, and that the September 23 order still stands and requires that these claims be expunged.

THE COURT: Mr. Speights?

MR. SPEIGHTS: Let me be very succinct, Your Honor. Number one, I disagree with everything that Mr. Bernick said except the fact that it was too late to call me at noon today to have a meet and confer. Number two, we're here on a status conference. I didn't come to argue the merits. I didn't bring the file with me. We're here to have a status conference. Mr. Bernick says you're submitted after he argues the merits for ten or fifteen minutes. Set it down for hearing. He doesn't want to concede anything. Set it down. It's been fully briefed. We'll argue. You'll finally decide it and we'll move on, and I want to contest not only what's in his briefs but his new arguments today. But again, this is a status conference. We shouldn't be taking up the Court's time arguing the merits of this thing once again. So, if Your Honor wants to address the merits, I'll do the best I can, but I came here, they prepared the agenda, I came here for a status conference to see if there was some way out of this thicket short of arguing the merits. It's obvious now that Mr. Bernick's not going to concede anything about this, and I'm prepared to address each issue he has brought up and argue it, and if you want to set it specially, if you want to set in December, whatever, I'm prepared to argue.

THE COURT: Mr. Speights, these three particular claims, what's the nature of the claims? What's the debtor facing in terms of liability on these claims?

MR. SPEIGHTS: There are three USA claims. One of them is far larger than the other two. I didn't bring the file and the claims with me today because this is a status report. I can't tell you the amount involved. I certainly can look that up and tell them. I'm sure Mr. Fink knows, and I'm sure he's told Mr. Bernick, but I simply don't know, and if I can log into my computer, I can tell you everything about them.

THE COURT: Well, does anybody from the debtors' side know the answer to that?

MR. BERNICK: Sitting here at this table, we don't know the details of these three particular claims.

THE COURT: You know, part of the reason I wanted the status conference is I simply don't know at this point what prejudice there's going to be to the debtor, and frankly, I need to have an argument if in fact it's not going to be resolved. If there is not going to be substantial prejudice to the debtor I think you ought to get it resolved. If there is, if it's a very large claim or if they are very large claims, and there is going to be some substantial prejudice, maybe there's nothing you can do but get it argued.

MR. BERNICK: Well, I'd be happy to take that up with my client and also with Mr. Speights. The difficulty really is that the - it's not just prejudice to the debtor.

I mean all this really emanates from the question of whether in fact if you need authority by the time you file a claim before a bar date, because to allow to not require authority or to get the authority afterwards basically means that the bar date -

THE COURT: Oh, no, I -

MR. BERNICK: - is, so -

MR. SPEIGHTS: You've ruled on that.

THE COURT: I've decided that issue.

MR. BERNICK: Yes, well, but this -

THE COURT: You have to have the authority in advance of the bar date.

MR. BERNICK: But see, the question of prejudice really comes down in a way, you know, is Grace prejudiced? I don't know, but that really was not the predicate for our position on expungement to begin with.

THE COURT: I know that. I understand that.

MR. BERNICK: Yeah, yeah.

THE COURT: But, nonetheless, I think we're spinning a lot of wheels because there's a factual issue on which you two cannot agree, and that really was not litigated in the context of the ratification hearing. Now, whether I can get there I think is wrapped up in the argument that you're making today and that Mr. Speights wants an opportunity to rebut. I'll give Mr. Speights that opportunity to rebut but

there is, I think, this factual contention that as to these three claims there really was authority before the bar date, therefore, they weren't subject to the ratification order because from Mr. Speights' point of view, there was no need for ratification because he had the authority before the bar date. So you don't look at ratification when the authority existed. I think that's - I hope - I don't want to speak for you, Mr. Speights. In a nutshell, that's kind of how I understand your argument.

MR. SPEIGHTS: Yes.

MR. BERNICK: I agree that it really turns on the other order here, which is the September 23 order that says, If you have the evidence -

THE COURT: Give it to the debtor, right. I understand.

MR. BERNICK: And, yeah - so, but I don't know what the story on the three claims - I'd be happy to go back to my client and take that matter up, but I did that before I came here, and we didn't see anything else to do. We did have proposals for how to kind of wrap this up, but they would have treated different clients differently in part because the paper's a little bit different for different kinds of clients.

THE COURT: Well, and I understand, Mr. Speights, obviously, I don't know the terms of your settlement and

again, I'm only making some suppositions. I understand from a lawyer's point of view in representing a myriad of clients that it's difficult to explain to one if there is some information submitted to one that a particular client's treated in some fashion differently from another, but the reality is that not all claims are alike, and to a certain extent sometimes they're, you know, there simply are reasons why some claims are treated differently. I don't know the justification in these particular cases. To the extent that there can be some settlement proposal, quite frankly, I really think these three, if it's at all possible, ought to be settled. I think you've got a legal issue - not a legal, a factual issue that may end up requiring me to go back and do - if I get past the debtors' argument with respect to the September 23rd order, some at least limited evidentiary hearing because I think it's going to be - If the debtor is contesting the authority date, and I understand the debtor to be contesting the authority date because even when the information was submitted, as I understand the debtor's position, the pre-March 31, 2005 deadline or date does not appear clearly on the facts or whatever it was that was the transmittal. So the debtor doesn't agree with the underlying factual premise to start with. So if I get past the legal argument, then I'm into a factual dispute in any event. Now, can it be a short trial - Yes. I suppose probably as trials

go in this case, it's probably going to be a short trial, nonetheless, it's then another proceeding that everybody has to get prepared for, and I'm not sure in the grand scope of things, that it is going to justify the effort that it will take. So, I would think that starting with what the limits of the claims are, what the likely prejudice to the debtor and the debtor's estate would be, might perhaps get you off of dead center, and I think perhaps, as to these three claims, some settlement effort really might be advisable.

MR. SPEIGHTS: I'm happy to proceed in that way, Your Honor. The one thing I can't do and I won't address in the discussions we had is I cannot agree to give up one of the claims, because I represent each one of the claimants. I understand claims - claimants are treated differently, but I'm not going to concede on any of the three, because just succinctly this and again I don't want to get into the merits, the position on the all three is, we had authority before March 31. We complied with the order and gave authority. Later on in the ratification fight the issue came up about the dates, and we believe we had several authorities because we had several bankruptcies, and we wanted to cure that and Your Honor addressed that. It's not a complicated factual situation. I guess what I would like to know, if we are not able to resolve it, are we going to start with a legal issue and then go to the factual issue or vice-versa or

at the same time -

THE COURT: No, I think -

MR. BERNICK: - and I don't care when you want to do it.

THE COURT: I think, Mr. Speights, the easiest thing to do would be to give you a chance to respond to what I consider an argument that the debtor just made concerning the September 23rd order and the July 13th filing that you made because I haven't looked at that July 13th filing either. I think you need an opportunity to do it. That may be the means-all and ends-all, and there's no point getting into the facts if in facts if in fact that's going to adjudicate the issue, and if I can't get around that position then, that's just going to end it. So, I don't see any point to try and set a trial if in fact I can't get past that argument. So, I think the issue would be joined by having you file a brief on that issue letting me set - it can be by phone. I don't think it's going to be a very long argument on that point only, and then I will give you a ruling on that point. If I think that I can get past that argument and I need an evidentiary hearing, we'll set one. If I can't get past that point then that will end it, and, you know, things will - you'll do what you need to do from there on.

MR. SPEIGHTS: Thank you, Your Honor.

MR. BERNICK: We also - I'm not sure just to be

complete on this. Your Honor has motions before you on summary judgment. I don't know how these claims, these three particular claims overlap with that, and I'd have to go back and check. I don't know if Mr. Restivo -

MR. SPEIGHTS: They don't overlap at all.

THE COURT: I don't think they're in -

MR. SPEIGHTS: We have two buckets. We have a bucket that's active before Your Honor on summary motions and we have a bucket on the way to the District Court and the question is, which bucket do these three go in.

THE COURT: Right now we're do they go? They don't go anywhere at the moment.

MR. SPEIGHTS: But they don't. They are out here and if you rule in favor of Mr. Bernick, I join them with the ones on the way to the District Court, and if you rule with me, they go back into Mr. Resitvo's bucket to decide what he wants to do with them, and I'm not sure what objections he wants to pursue on these three.

THE COURT: All right, why don't we do this. Why don't I give you time to attempt to settle these matters, to try to file some motion to approve a settlement in time for the January omnibus. It's too close for the December, at this point in time now. And if you can't, if your not able to do that, then how much time after that do you want to file your brief, Mr. Speights?

MR. SPEIGHTS: If settlement fails?

THE COURT: Yes.

MR. SPEIGHTS: Twenty days?

THE COURT: So, let me just pick a date. How about February the 15th?

MR. SPEIGHTS: That's fine, Your Honor.

THE COURT: Will you want to do a brief - I'll call it a reply, Mr. Bernick?

MR. BERNICK: Why don't you give us the opportunity, and we'll see if it's really necessary.

THE COURT: All right by when?

MR. BERNICK: Ten days later.

THE COURT: All right, February 26th. When's the February omnibus? Oh, can you possibly file this in time that I can put this on the February omnibus for argument, Mr. Bernick?

MR. BERNICK: Sure. I mean - whatever it takes to get this matter back before Your Honor I'm sure we'll - we won't have problems submitting a brief at that point. It ought to be pretty short.

THE COURT: February 22nd? The omnibus is the 25th? Yes, can you submit your brief by the 22nd?

MR. BERNICK: Sure, absolutely.

THE COURT: Argument on February 25 at the omnibus. I don't think the argument will take that much time that it

can't be done then, and it can be by phone, Mr. Speights. You don't need to be here for this argument specifically. If you choose to do it by phone, that's fine.

MR. SPEIGHTS: Thank you, Your Honor.

THE COURT: Okay. What else?

MR. BERNICK: That's it. We appreciate your spending the time late this afternoon.

THE COURT: Okay, I'm not sure folks whether you are aware that my clerk here in Delaware, Jennifer - Jennifer Patone Cook is going to be leaving. She has taken a job with a law firm here in Delaware. So Friday will be her last day. So effective on Monday, if you would please start emailing once again to Julie Johnston who was my prior clerk before Jennifer took over until I get a new permanent clerk here, that would be helpful. We posted the notice on the website. We will be sending a notice out to everyone that that will be a temporary change. Also keep mailing to the JKF box. I'm going to try to make arrangements to have Julie have access to Jennifer's emails to try to - Oh, that's been done? So, that should facilitate things in case anything falls through the cracks in the meantime, but nonetheless, I'm going back to Julie Johnston temporarily, and, yes, I'll take your orders.

MS. BAER: And, Your Honor, there's one other order and that is we filed a certification of counsel on the

omnibus hearing order, hearing agenda for next year, which has the -

THE COURT: Okay.

MS. BAER: Could we get that signed today too?

THE COURT: Yes, uh-huh.

MS. BAER: Great.

THE COURT: All right, thank you.

ALL: Thank you very much.

MR. EVER: I think there was some discussion about changing the hearing time?

THE COURT: Oh, yes, folks. Mr. Bernick, pardon me. Folks, may we have your attention for a minute. I'm thinking of pushing these hearing times back to maybe at least one o'clock starting in January? Would that adversely affect anyone?

MR. BERNICK: That would be great just because it means that . . . (microphone not recording). I'll say there's less pressure at the end of the day, but . . . whatever time . . . Obviously it would improve our chances of -

THE COURT: Getting home.

MR. BERNICK: Getting home.

THE COURT: Okay. Even earlier if - Once I get Federal-Mogul out of the system, but that's going to take a couple of months, then I can probably move it back even

earlier but I'm a little hesitant to do that until I get a couple of the Federal-Mogul leftover issues resolves. So why don't we say one o'clock starting in January.

UNIDENTIFIED SPEAKER: One o'clock is preferable. Before one, some of us would have to come in the night before in any event, so either way we'd lose a night. One o'clock we likely could get in and out on the same day.

THE COURT: All right, fine. Let's move it to one o'clock then.

MS. BAER: Your Honor, I can do this by hand or we can submit it -

THE COURT: Do it by hand, that's fine.

MS. BAER: I'll do it right now.

THE COURT: Sure.

MS. BAER: Right.

THE COURT: Okay, folks, thank you.

(Whereupon at 5:35 p.m., the hearing in this matter was concluded for this date.)

I, Elaine M. Ryan, approved transcriber for the United States Courts, certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Elaine M. Ryan December 3, 2007

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